San Francisco
Law Library

426 CITY HALL

No. 194697

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

NO. 21084

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS GARCIA,

Appellant,

vs.

UNITED STATES OF AMERICA.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
STEPHEN D. MILLER,
Assistant U. S. Attorney,
Assistant Chief,
Special Prosecutions Division,

827 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

NO. 21084

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS GARCIA,

Appellant,

vs.

UNITED STATES OF AMERICA.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
STEPHEN D. MILLER,
Assistant U. S. Attorney,
Assistant Chief,
Special Prosecutions Division,

827 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

NO. 11066

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS GARCIA,

Appellant,

vs.

UNITED STATES OF AMERICA,

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
STEPHEN G. MILLER,
Assistant U. S. Attorney,
Assistant Chief,
Special Prosecutions Division,

817 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

Statutes

NO. 21084

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS GARCIA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

Appellant Carlos Garcia appeals from his conviction on Count Three of a three count indictment charging him with a violation of Title 21, United States Code, Section 174 (Concealment of Illegally Imported Narcotics). He was charged with Co-defendant Edward G. Sanchez who does not appeal his conviction on Counts One and Two.

Count Three, upon which Appellant has been convicted charges him with knowingly and unlawfully receiving, concealing and facilitating the concealment and transportation of 1.190 grams of heroin, a narcotic drug, which he knew previously had been imported into the United States of America contrary to the provisions

of Title 21, United States Code, Section 173 [C. T. p. 2]. 1/

The indictment was filed on January 28, 1966 [C. T. p. 2].

Appellant and Co-defendant Sanchez waived jury on January 31, 1966 [C. T. p. 5], and on February 3, 1966, trial commenced without a jury before the Honorable Roger D. Foley, United States District Judge [R. T. p. 1]. 2/

On February 4, 1966, Appellant was found guilty on Count Three and not guilty on Counts One and Two of the indictment [C. T. p. 13].

On April 1, 1966, Judge Foley sentenced Appellant to ten years and recommended that he be committed to a hospital for treatment of narcotics addiction [C. T. p. 15].

The United States District Court for the Southern District of California had jurisdiction of this case based upon Title 21, United States Code, Section 174 and Title 18, United States Code, Section 3231. The jurisdiction of this Court is based upon Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 21, United States Code, Section 174 provides:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to

---

1/ "C. T." refers to Clerk's Transcript.

2/ "R. T." refers to Reporter's Transcript.

law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

STATEMENT OF THE CASE

A. Questions Presented

1. Did probable cause exist for the arrest of Appellant for violations of the Federal Narcotic Laws?

2. Assuming that there existed probable cause for the arrest of Appellant for a violation of the Federal Narcotic Laws, were the arresting officers required to obtain either an arrest or a search warrant at the time they entered Appellant's residence for the purpose of arresting him?

3. Did the Court erroneously admit into evidence Appellant's statements, made subsequent to his arrest?

B. Statement of Facts

While Agent Chris Saiz of the Federal Bureau of Narcotics was purchasing narcotics from co-defendant Edward G. Sanchez, on December 8, 1965, Sanchez stated that in the future, Saiz should telephone him when he wished additional narcotics [R. T. p. 3]. On the following day, Saiz telephoned Sanchez, stating to him that he desired to purchase additional heroin. Sanchez stated that the heroin would be available on the following day [R. T. p. 4].

At approximately 12:30 p. m., on December 10, 1965, Agent Saiz, using a telephone number previously furnished by Sanchez, telephoned Sanchez and made arrangements to purchase 1/2 ounce of heroin. Saiz was told to come to Sanchez's residence [R. T. p. 5].

Shortly thereafter, Agent Saiz, under the surveillance of other officers of the Federal Bureau of Narcotics and Deputies of the Los Angeles Sheriff's Office, drove in a Government vehicle to the intersection of LaVerne and Fourth Streets in Los Angeles, California. There, at approximately 1:15 p. m., he met with Sanchez, who suggested that they proceed to his friend's house to pick up the heroin. Sanchez and Agent Saiz then proceeded in the Government vehicle to the intersection of Brannock and Eastern. Sanchez exited the vehicle and made numerous telephone calls [R. T. p. 9]. Sanchez returned to the vehicle and the two drove to Eastern and Floral. After making an additional telephone call, Sanchez

advised Agent Saiz that the heroin would be ready at approximately 3:00 p. m. Saiz then drove Sanchez to the latter's residence where the two parted. All of the foregoing information was related to Agent Francis L. Briggs of the Federal Bureau of Narcotics [R. T. p. 10].

At approximately 3:00 p. m., Agent Saiz returned to Sanchez's residence [R. T. p. 11]. The two drove to the 700 block of Rowan Street where they met with Paul Perez whom Agent Briggs knew had previously been convicted of violating the Federal Narcotic Laws. Perez entered the Government vehicle, and directed Agent Saiz to drive to the 2700 block of Slauson [R. T. p. 12]. There, Perez exited the Government vehicle, walked to the rest-room of a service station, returned to the vehicle and displayed two rubber condoms containing a white substance which appeared to be heroin [R. T. p. 13].

Officer Saiz, Sanchez, and Perez then drove to the 300 block of Gifford Street [R. T. p. 13]. Perez explained that the heroin would have to be "cut" before it could be sold. At Gifford and Michigan Streets, Perez left the vehicle, stating that he would send someone there to meet the agent and Sanchez [R. T. p. 14].

Approximately ten minutes later [R. T. p. 57], Agent Saiz observed Appellant Garcia, who was standing near the residence at 320 Gifford, motion to Sanchez [R. T. p. 19]. Sanchez left Saiz and met with Appellant. The two were seen to walk to a neighborhood store [R. T. p. 20].

Sanchez returned to the Government vehicle telling Agent

Saiz that he had not "scored", but that the man with whom he had met (nicknamed "Lone" or "Lonie") had said the heroin was not ready but that he would call later [R. T. pp. 21-22]. Agent Saiz then drove Sanchez to the latter's residence, where the two parted. Sanchez stated that Saiz should telephone him later [R. T. p. 23].

Agent Saiz related his observations to Agent Briggs. This information included Lonie's appearance at 320 Gifford and the meeting between Appellant and Sanchez [R. T. pp. 24-25]. Agent Briggs knew that "Lonie" was Appellant Garcia's nickname. Briggs further realized that he had previously arrested Appellant for a violation of the Federal Narcotic Laws, and that Appellant had been convicted. Finally, Briggs knew Appellant lived at 320 Gifford [R. T. pp. 149-150].

Agent Saiz returned to Sanchez's residence at approximately 6:00 p. m., where the two met briefly. Saiz then advised Agent Briggs that Sanchez had stated that the heroin would be ready in a few minutes [R. T. p. 27].

Agent Saiz then returned to Sanchez's residence and the latter entered the Government vehicle. Sanchez stated that he had spoken to his friend and the heroin was ready [R. T. p. 28]. He requested and received $100. 00 from Saiz for the purchase of 1/2 ounce of hereoin, exited the Government vehicle, walked west on Michigan and returned, stating to Agent Saiz that he had turned over the money to his friend. Sanchez stated that they should drive to Michigan and Mariana Streets. There Sanchez again left the vehicle, and walked toward the intersection of Michigan and Mariana,

whereupon he was no longer within Agent Saiz's view [R. T. p. 28].

Sanchez returned to the vehicle, displaying two rubber condoms, and stated to Agent Saiz that he had scored. Saiz and Sanchez then drove off. Shortly thereafter, Sanchez was arrested in Saiz's vehicle [R. T. p. 30].

Narcotics Agent Sergio Borquez was directed by Agent Briggs to commence surveillance in the area of Michigan and Gifford Streets. Borquez had been advised of Agent Saiz's activities [R. T. p. 81].

Deputy Sheriff Richard Kennerly pointed out the residence at 320 Gifford, indicating to Borquez that Appellant Garcia had been selling narcotics from this address [R. T. pp. 83-84, 207]. Agent Borquez had also been advised of Appellant's Federal Narcotics conviction [R. T. p. 84].

At approximately 6:10 or 6:15 Agent Borquez observed Appellant and Sanchez meet inside the gate at 320 Gifford [R. T. p. 83], and observed Sanchez leave the yard, and turn toward the direction where Agent Saiz's vehicle was parked [R. T. p. 86]. Shortly thereafter, Borquez observed Appellant and Paul Perez come out of the yard at 320 Gifford [R. T. p. 86]. Both returned and entered the yard [R. T. p. 87]. Shortly thereafter, a yellow cab approached 320 Gifford. Borquez observed someone whom he could not identify come from the address, enter the car and drive off [R. T. p. 87].

Agent Borquez advised Agent Briggs of what he had observed [R. T. p. 87]. Briggs then advised Borquez to enter the residence

at 320 Gifford for the purpose of arresting Appellant and Perez [R. T. p. 88].

Agents Borquez and Figueroa approached the north side of Appellant's residence. The door was open. As the agents approached the door, Borquez observed the Appellant run. Borquez entered the residence, announced his identity and arrested Appellant [R. T. p. 89]. Appellant was advised that he did not have to say anything; that anything he did say could be used against him, and that he had a right to an attorney [R. T. p. 90].

After arriving at Appellant's residence, Agent Briggs learned that Appellant had been advised of his constitutional rights. A quantity of heroin (Government's Exhibit 2) [C. T. p. 8] was found by Briggs in the bedroom [R. T. p. 157].

Appellant Garcia admitted to Briggs that the heroin (Government's Exhibit 2) belonged to him [R. T. pp. 160, 258].

IV

ARGUMENT

A. PROBABLE CAUSE EXISTED FOR APPELLANT'S ARREST FOR A VIOLATION OF THE FEDERAL NARCOTIC LAWS.

The Court was correct in finding that at the time the officers arrested Appellant, the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that Appellant was

committing an offense. Brinegar v. United States, 338 U.S. 160, 175-176 (1949); Henry v. United States, 361 U.S. 981, 202 (1959). The arresting agents acted based upon the following knowledge:

(1) Co-defendant Sanchez sold heroin to Agent Saiz two days before Appellant was arrested [R.T. p. 3].

(2) Having made arrangements to purchase heroin from Sanchez on December 9, 1965, Agent Saiz met with Sanchez on December 10th. On that occasion Sanchez introduced Agent Saiz to Paul Perez. Agent Briggs knew that Perez had previously been convicted of violating the Federal Narcotic Laws [R.T. p. 12].

(3) Perez accompanied Agent Saiz and Sanchez in Saiz's vehicle to a destination which had been suggested by Perez [R.T. p. 12]. At this destination, Perez exited the vehicle and thereafter returned with two rubber condoms containing what appeared to Agent Saiz to be heroin [R.T. p. 13].

(4) Perez directed Saiz to drive to another location. There he left Saiz and Sanchez, telling them that he would send someone to meet with them [R.T. p. 14].

(5) Approximately ten minutes later, Agent Saiz observed Appellant Garcia motion to Sanchez. At that time, Garcia was standing near a residence at 320 Gifford [R.T. p. 19].

(6) Sanchez was then observed to meet with Appellant Garcia [R.T. p. 20].

(7) Sanchez returned to Saiz, stating that the man with whom he had just met and to whom he referred as "Lone" or "Lonie", had stated that the heroin was not then ready [R.T. pp. 21-22].

(8) Agent Briggs, to whom Agent Saiz had related his activities, recalled that he had previously arrested Appellant Garcia for a violation of the Federal Narcotic Laws, and that this arrest had led to a conviction. Briggs further knew that Garcia had resided at 320 Gifford, and was nicknamed "Lonie" [R. T. pp. 24-25].

(9) Shortly after 6:00 p. m., Agent Saiz met with Sanchez. The two drove to the area where Sanchez and Appellant had met that afternoon. One hundred dollars was turned over by Saiz to Sanchez. Sanchez left the vehicle, and thereafter returned, indicating that his friend had received the money. Sanchez left the vehicle again, and returned with two rubber condoms, stating that he had scored [R. T. p. 28].

(10) Shortly thereafter, Sanchez was arrested in Saiz's automobile for violation of the narcotic laws [R. T. p. 30].

(11) At approximately 6:10 or 6:15 p. m. Agent Borquez, who was conducting surveillance operations, observed Appellant Garcia meet with Sanchez inside the gate at 320 Gifford. Sanchez was then observed to leave the yard, and walk toward the direction of Agent Saiz's vehicle [R. T. pp. 83-86].

(12) Deputy Sheriff Kennerly told Borquez that Appellant was selling narcotics from 320 Gifford [R. T. pp. 83-84, 207].

(13) Paul Perez was observed in the yard at 320 Gifford at about this time [R. T. 86].

(14) When the Agents approached Appellant's residence, he began to run [R. T. p. 89].

In Dagampat v. United States, 352 F. 2d 245 (9th Cir. 1965), the Court found probable cause on the following facts: Following directions of informant Rodriguez, on May 28, 1964, Agent Nice drove Rodriguez (and another) to a certain street intersection in Los Angeles. Rodriguez told Agent Nice that his "connection" (supplier of narcotics) told him to sit on a particular bus stop bench at a certain time. Nice gave to Rodriguez $225.00, consisting of bills whose serial numbers had previously been recorded. Rodriguez sat on the bus stop bench within view of Agent Nice. In a few minutes Agent Nice observed appellant drive up, stop near the bench, and have conversation with Rodriguez. Rodriguez then returned to Agent Nice, and said that his connection didn't bring the narcotics with him, and that Rodriguez would have to go around the block to get it. Then Rodriguez got into the car driven by appellant, and appellant drove out of Agent Nice's view. Agent Nice noted the description and license number of the car. About ten minutes later, Rodriguez returned and delivered narcotics to Agent Nice.

Later that day Agent Nice discovered that the car in question was registered to appellant, and further discovered that appellant had previously been arrested for narcotics violations, and had previously been convicted as an addict.

On June 24, 1964, Agent Nice learned that Rodriguez had been arrested a week before, for selling narcotics to a Federal Agent. The arresting Agent told Nice that during the transaction Rodriguez had met with a person whose appearance and physical

description fit that of appellant.

At about 6:00 p.m. on June 24, Nice and other agents went to appellant's home, without a warrant, for the purpose of arresting him. As the officers approached the front of appellant's residence, appellant, who had been standing in the doorway, went inside and slammed the door. The Agents ran up to the door and knocked; they heard a sound as if the door was being bolted; they hollered "Police Officers!" and knocked more; they heard a voice call "What do you want?"; they answered: "Police officers, Dagampat, open the door!" and continued knocking.

The Agents then heard sounds as if someone were running away from the door, and then they forced open the door. After doing so, they observed appellant running toward the bathroom; they ran after him, telling him to stop, that he was under arrest. He kept going, entered the bathroom and slammed the door. The Agents forced open the bathroom door, and seeing appellant reaching toward the toilet, retrieved from the toilet a paper bag that contained marijuana. A search of the premises also produced $220.00 of the $250.00 that had been given to Rodriguez on May 17, 1964, in payment for heroin.

Appellant relies primarily on the case of Mangaser v. United States, 335 F.2d 971 (9th Cir. 1964), the facts of which bear some similarity to those in the case at bar. In Mangaser, a special employee of the Bureau of Narcotics drove with an informant to make a purchase of narcotics, followed by a Buick containing other potential customers for narcotics. The employee observed

an apparently disabled car whose occupants were Mr. and Mrs. Mangaser and their child. The informant walked up to the apparently disabled car and spoke to its occupants. The informant returned to the special employee and asked for the marked money for the purchase of heroin. While the informant was returning to the special employee's car, the car containing the Mangasers drove out of the special employee's view. The informant then left the view of the special employee, going in the same general direction as the car containing the Mangasers. Later the informant returned with narcotics, saying he had obtained his source's last supply and that the source had to go get some. No attempt was made to supply or even contact in any way the other potential customers for narcotics in the Buick that followed the special employee's car. When the Mangasers returned to their home later that day they were arrested without a warrant.

This Court held that the foregoing facts did not provide reasonable cause for the arrest of the Mangasers without a warrant. However, in the case at bar, the arresting officers had much more specific information, not only regarding the fact that an offense had been committed, but also that Appellant had committed it. Furthermore, there was no ambiguity about who was referred to when co-defendant Sanchez spoke of his friend and source, "Lonie".

Earlier, Perez had described in advance the manner in which Agents Saiz and Sanchez were to meet their connection.

Furthermore, in Mangaser the arresting officers had no information concerning prior narcotic violations by the Mangasers.

Here Agent Briggs and Borquez had the highly significant information that appellant had previously been convicted of a Federal Narcotic violation. As the Supreme Court said in Jones v. United States, 362 U.S. 257, 271 (1960):

> " * * * that petitioner was a known user of narcotics made the charge against him much less subject to skepticism than would be such a charge against one without such a history."

That Appellant was a known prior offender of the Federal Narcotic Laws, could reasonably have had an important bearing on the officers' interpretation of his conduct as they approached the open door of his home. See United States v. Monroe, 205 F. Supp. 175 (D.C. E.D. La. 1962), 320 F. 2d 277 (5th Cir. 1963) affirmed, cert. denied 375 U.S. 991 (1964).

Appellant's act of running when seeing the officers approach the door to his home could hardly be considered anything but flight, or an attempt to destroy evidence, Dagampat v. United States, supra, at 248. Flight is a legitimate ground for the inference of guilt. Rosett v. United States, 315 F. 2d 86 (9th Cir. 1963), cert. denied, 375 U.S. 814. These factors, amounting to guilty conduct did not appear in Mangaser.

The arresting officers had sufficient probable cause to enter Appellant's residence and arrest him for a violation of the Federal Narcotic Laws.

B. SINCE PROBABLE CAUSE FOR THE BELIEF THAT APPELLANT HAD VIOLATED THE FEDERAL NARCOTIC LAWS EXISTED, NEITHER AN ARREST NOR SEARCH WARRANT WAS REQUIRED.

Appellant contends that notwithstanding the fact that probable cause may have existed for his arrest, since the arresting officers had neither a search nor arrest warrant [R. T. p. 104], the arrest and subsequent search were illegal. This contention, however, runs contrary to the most recent authorities.

This Court must apply California law to determine the validity of Appellant's arrest. In Ker v. State of California, 374 U.S. 23, 27 (1962), the United States Supreme Court said:

> "This Court, in cases under the Fourth Amendment, has long recognized that the lawfulness of arrests for Federal offenses is to be determined by reference to State Law insofar as it is not violative of the Federal Constitution." See also Miller v. United States, 357 U.S. 301 (1958); United States v. Di Re, 332 U.S. 581 (1947); Johnson v. United States, 333 U.S. 10 (1948).

Appellant complains that since the arresting officers had neither an arrest nor search warrant the subsequent search was unlawful since there was time enough in which to obtain a warrant. But California has no requirement that a warrant must be obtained if there is time to do so. In the recent case of People v. Stoner, 205 Cal. App. 2d 108, 110, 22 Cal. Rptr. 718, 720 (1962), reversed

on other grounds, 376 U.S. 483 (1964), the court said:

> "Furthermore, it is conclusively established in this State that the failure to obtain a warrant, even though there be time to do so, does not make unreasonable an otherwise reasonable search."

In Lorenzen v. Superior Court, 150 Cal. App. 2d 506, 512-513, 310 P. 2d 180-185 (1957), the Court upheld as valid an arrest and search made without a warrant of any kind, two weeks after the officers received the information on which the arrest was primarily based, saying:

> "We cannot say that * * * as a matter of law, permitting an elapse of approximately two weeks without getting a warrant, is without the 'flexibility' which the Rabinowitz case holds 'will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential' (339 U.S. at page 65, 70 S.Ct. at page 435), or unreasonable."

In People v. Winston, 46 Cal. 2d 151, 162-163, 293 P. 2d 40, the California Supreme Court said:

> "Defendant unavailingly argues that here the police officers had ample time to procure a search warrant, and therefore, such warrant was required in order to validate the search and seizure of the incriminating evidence at the time of his arrest." (Emphasis supplied.)

The United States Supreme Court stated in United States v. Rabinowitz, 339 U.S. 56, 66 (1950):

> "To the extent that Trupiano v. United States, 334 U.S. 699 [68 S.Ct. 1229, 92 L.Ed. 1663], requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

Finally, in McCray v. State of Illinois, ___ U.S. ___, 37 L.W. 4261, decided March 20, 1967, the United States Supreme Court once again approved the procedure of an arrest of a defendant for possession of narcotics when adequate probable cause had been demonstrated but when the arresting officers possessed neither a search warrant nor an arrest warrant.

C. THE SEARCH OF APPELLANT'S RESIDENCE WAS MADE INCIDENTAL TO A LAWFUL ARREST AND WAS PROPER IN SCOPE.

The arrest of Appellant having been lawful, the search incidental thereto and performed at the time of arrest was proper. Only the premises under the immediate custody and control of Appellant were searched. Of course, there was authority to conduct such a reasonable search of Appellant's bedroom, a room located

proximate to the room in which Appellant was arrested [R. T. p. 246]. See United States v. Rabinowitz, supra; Agnello v. United States, 269 U. S. 20 (1925). The entire premises under the arrested person's custody and control may properly be searched. Harris v. United States, 331 U. S. 145 (1947). Here the finding of a small packet of heroin concealed under the rug of Appellant's bedroom does not lead to an inference that an exploratory search was conducted.

Appellant cites the case of Drayton v. United States, 205 F. 2d 35 (5th Cir. 1953), in support of his position that the search was exploratory and too broad in scope. However, in Drayton, the narcotic agents searched a hotel room located some distance from the room where the arrest occurred and it was held that the search was illegal because it was tantamount to a "fishing for evidence". The Court further found that the arrest was being used as an excuse to search. That situation is, of course, different from the search here, which was limited to a search of the adjacent rooms of Appellant's residence.

D. THE COURT WAS CORRECT IN ADMITTING INTO EVIDENCE STATEMENTS MADE BY APPELLANT SUBSEQUENT TO HIS ARREST.

Appellant suggests that the Court erred in admitting certain of his statements into evidence. The statements complained of were made subsequent to Appellant's arrest [R. T. p. 90], and

involved the admission that Government's Exhibit 2 belonged to Appellant [R.T. p. 160].

Prior to questioning Appellant, Agent Borquez advised Appellant that he did not have to say anything; that anything he did say could be used against him, and that he had a right to an attorney [R.T. p. 90].

That warning met the Constitutional requirements in operation at the time of trial.

Trial of this matter commenced on February 3, 1966, and as the Court held in Johnson v. New Jersey, 384 U.S. 719, 734 (1966), the requirements of Miranda v. Arizona, 384 U.S. 436 (1966), with reference to the requirement of advising a defendant that if he does not have funds with which to hire an attorney that counsel will be furnished for him are not controlling in determining the admissibility of statements. The admissibility of Appellant's statement is dependent upon the fact that it was voluntary and if the ruling set forth in Escobedo v. Illinois, 378 U.S. 454 (1964), has been violated. In Escobedo, supra, the Court held that when a suspect had requested and was then denied an opportunity to consult with an attorney and when the police had not effectively warned him of his absolute right to remain silent, any statement he might make under those circumstances will be inadmissible. Id. at 490-491. If a defendant knowingly is aware of his right to remain silent and to have counsel and does not request such counsel he has waived such assistance. See, United States v. Childress, 347 F.2d 448, 450 (7th Cir. 1965); Hayes v. United States, 347 F.2d 668 (8th Cir.

1965).

Appellant suggests that the damaging statements made by him were elicited because Appellant's father had stated to him that one of the narcotic agents had told him he would be taken in as an accomplice [R. T. p. 246]. Appellant admits that no officer made any such threat to him [R. T. 258].

Finally, Appellant offered no further evidence respecting this contention.

Appellant's statements were voluntarily made after a proper Constitutional warning. The Court properly received them in evidence.

V

CONCLUSION

For the reasons stated the Judgment of the District Court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

STEPHEN D. MILLER,
Assistant U. S. Attorney,
Assistant Chief,
Special Prosecutions Division,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Stephen D. Miller

STEPHEN D. MILLER
Assistant U. S. Attorney
Assistant Chief,
Special Prosecutions Division.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM McFARLAND, Petitioner and Appellant, vs. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Respondent and Appellee.	No. 21085

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

JOYCE F. NEDDE
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-1348

Attorneys for Respondent-Appellee

TOPICAL INDEX

TABLE OF CASES

Table of Cases (Continued)

TEXTS, STATUTES AND AUTHORITIES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM McFARLAND, Petitioner and Appellant, vs. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Respondent and Appellee.	)	No. 21085

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court for the Northern District of California to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253. Proceedings in forma pauperis are authorized by Title 28, United States Code section 1915.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

On September 28, 1958, appellant, a prisoner at San Quentin State Prison, was convicted in the Superior Court of Los Angeles County of violating

California Penal Code section 187 (murder in the first degree), section 211 on three separate counts (robbery), and section 664 (attempted robbery) (1R 59, 2R 3-4). Appellant did not appeal from the judgment of conviction (2R 106) and now alleges that he did not know of his statutory and constitutional right to appeal (1R 3).

Application for writs of habeas corpus to the Superior Court of Marin County and the California Supreme Court were denied on November 20, 1964, and February 17, 1965, respectively (1R 6).

B. Proceedings in the Federal Courts

Appellant filed a petition in forma pauperis for a writ of habeas corpus in the District Court on March 24, 1965 (1R 1). On March 30, 1966, the petition was denied (1R 59). On April 29, 1966, Judge Zirpoli granted appellant's application for certificate of probable cause and for leave to appeal in forma pauperis (1R 71). On that same date appellant filed a notice of appeal to this Court (1R 72).

STATEMENT OF FACTS

An evidentiary hearing on the petition for writ of habeas corpus held in the United States District Court for the Northern District of California before Judge Zirpoli on July 8, disclosed the following evidence

which is contained in Volume II of the Transcript of Record.

Appellant was arrested by the Los Angeles Police Department on Saturday afternoon, May 10, 1958, and detained at the Newton Street substation pending transfer to the city jail (2R 6-9). That Saturday evening he was moved to the city jail and remained there until Tuesday afternoon, May 13, 1958 (2R 9, 22). Throughout his detention, appellant was treated as an ordinary prisoner. He received meals at the regular hours and participated in the normal routine of the city prison (2R 13-15).

On Tuesday morning, May 13, at approximately 10:00 or 11:00 a.m., he was taken from his cell and given a polygraph examination (2R 16). At the conclusion of this test he was immediately taken to an interrogation room by the investigating officers (2R 16-17). The investigating officers, Williams and Seiger, and the appellant were the only ones present at that time (2R 124). During this interrogation, which lasted approximately two hours, he confessed his active participation in the crimes of which he was ultimately convicted - murder, robbery and attempted robbery (2R 18, 159).

Appellant was returned to the Newton Street substation later that same afternoon (2R 22). During

this transfer he was taken to the vicinity of Central Avenue and 22nd Street and asked to identify the liquor store in which the murder had occurred (2R 38-39, 128-130, 168). Appellant complied with the officers' request and identified the correct location. On arriving at the Newton Street substation, appellant was again subjected to a question and answer interrogation wherein he immediately rendered a second confession. This interrogation was transcribed by a stenographer and initialed and signed by appellant (2R 22-23, 88, 132, 170-171).

Appellant was not advised of his constitutional right to remain silent nor his right to obtain counsel (2R 24, 136, 137). He had not been arraigned nor taken before a magistrate during the three days he was in custody prior to volunteering his confession (2R 193). At the time of his arrest appellant was 18 years of age and had a junior high school education (2R 30, 25). After leaving school he had served over two years in the Navy until June 29, 1957 (2R 26, 29, 99). He had had prior experience with law enforcement officials as the result of two convictions for larceny by court-martial while in the armed services (2R 27, 101).

In addition to the uncontested facts stated above, evidence pertaining to certain other allegations

of appellant was produced at the evidentiary hearing.

Appellant alleged that he was physically mistreated by the investigating officers during the course of the original interrogation and during transportation to the substation after his initial confession (2R 17, 33-34, 40, 65-67). Officers Williams and Seiger, who were the only officers implicated, appeared at the evidentiary hearing. Their testimony specifically contradicted all of the appellant's allegations of physical brutality (2R 126, 134, 137, 166, 168, 173). The District Court thereupon found that the appellant was not subjected to any physical brutality (1R 62-63).

Officer Williams testified that in 1958 it was the policy of the Los Angeles Police Department that it was necessary to get permission of the investigating officer assigned to the case before anyone other than attorneys and bail bondsmen could talk to a prisoner (2R 115-116, 156, 161-163). At that time it was also the policy of the police department to arraign a prisoner on a charge as soon as the investigation was completed (2R 116).

Appellant also testified at the evidentiary hearing that he had made requests to telephone his father after being taken into custody (2R 6, 8, 10, 16, 17, 25, 77). However, both Officers Williams and Seiger flatly

denied that any such request was ever made to them (2R 130, 135, 167, 174); and appellant admitted that he had made no mention in his lengthy testimony at the trial of the alleged phone requests (2R 51-52).

APPELLANT'S CONTENTIONS

1. Prolonged confinement of petitioner, an uneducated youth, without formal proceedings and without communication with the outside world rendered the self-incriminating statements involuntary.

2. Failure to advise petitioner of his rights to silence and counsel augments the involuntary character of the self-incriminating statements.

3. The psychological pressure on petitioner of having to make a life or death decision adds even more weight to the involuntary character of the self-incriminating statements.

4. The denial of petitioner's requests to telephone his father violates the clear-cut prohibition against denying access to outside assistance.

(a) Absence of corroborating evidence is not grounds for pre-emptorily disregarding petitioner's testimony that he had requested to telephone his father.

(b) Even if there were no actual denial of access to the outside world, petitioner's

isolation from it necessarily created adverse psychological pressures.

SUMMARY OF APPELLEE'S ARGUMENT

The District Court properly denied the writ because the totality of the circumstances surrounding appellant's confession in 1958 does not indicate that it was involuntary and therefore inadmissible.

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED THE WRIT BECAUSE THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING APPELLANT'S CONFESSION IN 1958 DOES NOT INDICATE THAT IT WAS INVOLUNTARY AND THEREFORE INADMISSIBLE.

The district court denied the petition for writ of habeas corpus on the ground that appellant had failed to carry the burden of proof of his allegation that admission of his confession in the trial court was error because it had not been made freely and voluntarily and without compulsion of any sort. Wilson v. United States, 162 U.S. 613 (1895). That finding of fact by the district court should not be set aside unless this reviewing court determines that it is clearly erroneous. Fed. R. Civ. P. 52(a). Davis v. Johnston, 157 F.2d 64 (9th Cir. 1946), cert. denied 331 U.S. 813 (1947); Price v. Johnston, 144 F.2d 260 (9th Cir. 1944), cert. denied 323 U.S. 789 (1944); and Kelly v. Johnston, 128 F.2d 793 (9th Cir. 1942), cert. denied 317 U.S. 699 (1943).

It was held in Gallegos v. Colorado, 370 U.S. 49 (1962), that determination of whether a confession is involuntary so as to be inadmissible in a state court under the due process clause of the Fourteenth Amendment involves close scrutiny of the facts of the individual case and must be based upon a

totality of the circumstances.

In Culombe v. Connecticut, 367 U.S. 568, 601-602 (1961), the Court pointed out that no single test for constitutionally impermissible interrogation by state law enforcement officers in obtaining confessions exists - neither extensive cross-questioning nor undue delay in arraignment nor failure to caution the prisoner nor refusal to permit communication with friends and legal counsel. Each of these factors, in company with all the surrounding circumstances - the duration and conditions of detention, the manifest attitude of police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control - is relevant. The ultimate test is the voluntariness of the confession. An examination of these factors will show that appellant has failed to prove that his confession was involuntary in view of the evidence and applicable court decisions.

1. Cross-Questioning

Appellant was questioned only on Saturday for two to three hours (2R 7-8) and again on Tuesday for two more hours before signing the original confession. Both of these interrogations were conducted during the daytime and in accordance with existing

police policy that only the investigating officers, Sergeant Williams and Sergeant Seiger, were present. As a result, the cases cited by the appellant can be distinguished on the facts.

In Spano v. New York, 360 U.S. 315 (1959), the confession was secured following a massive interrogation involving a veritable regiment of officials for 8 straight hours throughout the night. The confession in Davis v. North Carolina, 384 U.S. 737 (1966), was obtained following police interrogation conducted at various times extending over a 16-day period of confinement. This decision, incidentally, is the only new case contained in appellant's brief which had not been previously cited by him or considered by the district court in its decision.

2. Delay in Arraignment

The policy of the Los Angeles Police Department in 1958 was to arraign a prisoner on the charge as soon as the investigation was complete. This, of course, was not a fixed time and in appellant's case he was not arraigned until after he had been in custody for three days, during which time he confessed.

Although there is a strict federal policy of exclusion of all confessions obtained by federal

officers during a period of illegal detention of a suspect prior to his arraignment [McNabb v. United States, 318 U.S. 332 (1942)], voluntary confessions secured by state officers during such a period prior to prompt arraignment may be admitted in state prosecutions without violating any of the prisoner's constitutional rights.

> "The bare fact of police 'detention and police examination in private of one in official state custody' does not render involuntary a confession by the one so detained. Brown v. Allen, 1953, 344 U.S. 433. . . . Neither does . . . the failure of state authorities to comply with local statutes requiring that an accused promptly be brought before a magistrate. Fikes v. State of Alabama, 1957, 352 U.S. 191. . . ."

Crooker v. California, 357 U.S. 433, 437, decided the same year as this case (1958).

3. Failure to Caution Prisoner

Appellant cites Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966), to support his contention that his confession was involuntary. However, in Johnson v. New Jersey, 384 U.S. 719 (1966), the Supreme Court has held that

the Miranda and Escobedo decisions are not to be applied retroactively. Therefore, the mere failure in 1958 of police officers to advise appellant of his rights to silence and to counsel in accordance with the restrictive standards set out in those later decisions would not be sufficient to render his confession involuntary. See Ashcraft v. Tennessee, 322 U.S. 143 (1943), for the standards previously enunciated by the Supreme Court and effective in 1958.

4. Communication with Legal Counsel and Family

Appellant's allegations that he had asked for and been refused permission to telephone his father were contradicted by the testimony at the evidentiary hearing of the two police officers who could be identified and were available seven years after his trial. Officers Williams and Seiger flatly denied that appellant had ever asked them to be allowed to telephone his father. It is noteworthy that, in accordance with police policy at that time, these officers were the investigating officers on the case and as such were the only ones authorized to talk with the appellant without special permission. They were with him for several hours on two occasions. Furthermore, during his lengthy testimony at the trial, appellant made no mention of the alleged phone requests (2R 51-52).

Appellant also admitted that he never asked to call an attorney or anyone else in his family (2R 15, 51-52).

In Haynes v. Washington, 373 U.S. 503 (1963), the Court possessed independent evidence establishing the existence and denial of petitioner's requests to telephone his wife. As a result, the Court there did not face the problem of determining whether the petitioner's own testimony would be sufficient to establish the existence of impermissible police conduct which would render inadmissible the written confession ultimately obtained. Moreover, the Court attributed significance to the failure of the state to contradict testimony of the defendant that the police would not permit him to telephone his wife until after he had made a written confession.

In this case, Officer Seiger specifically denied that either he or Officer Williams had ever at any time told appellant that he would not be allowed to talk to anyone until such time as he satisfactorily answered the questions put to him by interrogating officers (2R 189-90). In addition, appellant has admitted that, following his confession, he asked Sergeant Williams not to call his father or any of his other relatives (2R 80-82).

5. Duration and Conditions of Confinement

Appellant was in custody for three days prior to his confession. He was interrogated twice during the daytime for not more than three hours each time. At all other times he was treated as an ordinary prisoner. He received meals at the regular hours and participated in the normal routine of the city prison (2R 13-15).

Although appellant alleged some relatively mild physical abuse or mistreatment by the investigating officers, both officers flatly denied it. The District Court found upon consideration of the evidence that appellant had not been subjected to any physical brutality (1R 62-63).

6. Manifest Attitude of Police toward Prisoner

Following the appellant's original confession, Officer Williams cautioned him, "I warn you to consider this when you make a statement like that because we believe in being square." (2R 80:25-81:2), and reminded him that his father might be concerned about him. Appellant replied that his father wouldn't be likely to worry and requested the officers not to say anything to his father or other relatives. However, appellant did indicate that he wanted to return some property to his landlady. The police offered to take it to her themselves if she couldn't be reached by telephone,

and this was done (2R 131).

Thereafter, appellant was returned to the substation where he rendered the second confession. During the transfer he was taken to the vicinity of the crime and asked to identify the store in which the murder had occurred. He complied with the officers' request and identified the correct location. At appellant's request, the officers did not take him into the store where other people were present.

Another transcribed portion of the interrogation said (2R 98:24-99:1):

> "Q. We handled you guys pretty good, haven't we?
>
> "Unidentified voice: (Unintelligible statement.)
>
> "Mr. McFarland: I wish the Judge would handle me like that."

Sergeant Seiger also testified that the relationship between appellant and Williams and himself was nothing but the very best and that appellant had been cooperative with them (2R 189).

7. Physical and Mental State of Prisoner

At the time of his arrest, appellant was 18 years of age and had a junior high school education. After leaving school he had served over two years in

the Navy and during that time he had been twice court-martialed and convicted of larceny.

As a result, he was far more sophisticated than the appellants in either Haley v. Ohio, 332 U.S. 596 (1947), where a 15-year-old boy was subjected to prolonged questioning for five days; or Gallegos v. Colorado, 370 U.S. 49 (1962), where a 14-year old boy was detained for five days without being permitted to see his parents or an attorney and was not promptly brought before the juvenile court. Accordingly, the district court found that appellant's will had not been overborne at the time he confessed (1R 67). Lynumn v. Illinois, 372 U.S. 528 (1963).

CONCLUSION

Appellee submits that the finding of the district court that the totality of the circumstances surrounding appellant's confession in this case was not involuntary and, hence, its admission into evidence was not a violation of appellant's right to due process under the Fourteenth Amendment was not clearly erroneous. The finding is supported by the evidence and cases cited above and, as a result, this Court should not reverse the order denying the petition for writ of habeas corpus.

It would not be fair to the states nor to the public to vacate judgments as old as this one on the

basis of evolving constitutional standards which could not have been reasonably anticipated by the police at the time they acted, particularly since the standards enunciated by the United States Supreme Court in Culombe v. Connecticut, supra, adequately protect the interest of the integrity of the fact finding process from the unreliability of involuntary confession. Johnson v. New Jersey, 384 U.S. 719 (1966). To hold otherwise would run counter to the Supreme Court's course in Johnson v. New Jersey, in which the desirability of finality in criminal judgments comporting with current constitutional standards is recognized. The more recent guidelines which have since been laid down in Miranda and other cases will serve as standards for the interrogation of suspects by the police in the future.

It is respectfully submitted that the order of the District Court denying the petition for writ of habeas corpus should be affirmed.

Dated: January 31, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

Joyce F. Nedde

JOYCE F. NEDDE
Deputy Attorney General

CR SF
65-512

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: January 31, 1967

JOYCE F. NEDDE
Deputy Attorney General

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LEE INGLE, Appellant, vs. CLETUS J. FITZHARRIS, Superintendent, Appellee.	No. 21093

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

RONALD H. KEARNEY
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-3293

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF CASES

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LEE INGLE, Appellant, vs. CLETUS J. FITZHARRIS, Superintendent, Appellee.	No. 21093

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, USC § 2241. The jurisdiction of this court is conferred by Title 28, USC § 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals, when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

Petitioner was convicted in 1958 of both possession and sale of marijuana. Thereafter, his conviction was reversed by the California District Court of Appeal, Third District, upon the ground that the incriminating evidence found upon this person was illegally seized. See People v.

Ingle, 343 P.2d 780 (1959). However, the opinion of the District Court of Appeal was vacated by the granting of a hearing by the California Supreme Court. Thereafter, on January 19, 1960, the California Supreme Court affirmed the conviction in an opinion which dealt not only with the search and seizure question, but with the contention that the petitioner was deprived of his constitutional right to counsel and his right to the process of court to compel the attendance of witnesses. See People v. Ingle, 53 Cal.2d 407, 348 P.2d 577 (1960).

Thereafter, petitioner sought writs of habeas corpus in both the Superior Court of Monterey County and the California District Court of Appeal, First District, Division Two. Petitioner raised in both petitions essentially the same points he now presents to this Court. Both petitions were denied (CT 35).

B. Proceeding in the Federal Court

On October 29, 1965, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California (see CT 1, 25). An Order to Show Cause was issued and on December 27, 1965, appellee filed a Return to the Order to Show Cause (CT 18). On January 10, 1966, appellant filed a Traverse to the Return (CT 54).

On February 15, 1966, the District Court issued an

order discharging the Order to Show Cause and denying appellant's petition (CT 67). On March 14, 1966, appellant filed a petition for rehearing (CT 69) which petition was denied on April 5, 1966 (CT 73). A timely notice of appeal was filed by appellant on April 13, 1966 (CT 74). On May 20, 1966, an order was entered granting the appellant's application for a certificate of probable cause and allowing him to appeal in forma pauperis (CT 81).

SUMMARY OF APPELLEE'S ARGUMENT

I. The District Court was not required to hold an evidentiary hearing.

II. Appellant made a knowing and voluntary waiver of counsel.

III. Appellant was not denied compulsary process for obtaining witnesses.

ARGUMENT

I.

THE DISTRICT COURT WAS NOT REQUIRED TO HOLD AN EVIDENTIARY HEARING.

Appellant complains that the District Court, presented with his petition asserting denials of constitutional rights, erred in not ordering an evidentiary hearing. Appellant relies on Townsend v. Sain, 372 U.S. 293 (1963), which holds that on petition for habeas corpus when the facts are in dispute, the federal court must hold an evidentiary hear-

ing if the petitioner did not receive a full and fair hearing in the state court. However, that decision, like its predecessor, Brown v. Allen, 344 U.S. 443 (1953), does not require a District Court to hold a hearing on every habeas corpus application, but only when the basic historical facts are an issue. Respondent submits that in the instant case the basic facts are not in dispute. Therefore in such a situation, the need for a District Court hearing is obviated. See also Nelson v. People of State of California, 346 F.2d 73 (9th Cir. 1965).

II.

APPELLANT MADE A KNOWING AND VOLUNTARY WAIVER OF HIS RIGHT TO COUNSEL.

Appellant contends that his waiver of his right to counsel was not voluntary because the actions of his court appointed counsel nullified his freedom of choice. Following an independent examination of the record, the District Court found appellant's contentions to be without merit, and agreed with the findings of the California Supreme Court (see CT 68). In People v. Ingle, 53 Cal.2d 407 at pages 416-417 the California Supreme Court said:

> "Ingle's contention that he was deprived of his constitutional right to counsel lacks substance here. The record shows that Attorney Barcroft, an experienced member of the bar, was appointed by the court to represent

Ingle in February, 1958. The same attorney was appointed to represent codefendants Garcia and Adame, defendant Sondra Ingle being represented by other private counsel. At the arraignment on March 7, 1958, Garcia pleaded guilty. Barcroft, appearing with and on behalf of Ingle and Adame, asked for a week's continuance and for the appointment of other counsel. The request was denied. No representation was made to the court then or at subsequent appearances in court of Ingle, Adame and Barcroft on March 14, March 17, and April 18 in connection with setting the trial date, that there was any objection to Barcroft's representation of these two defendants or that there was any conflict of interest in their respective defenses. [Emphasis added.] A few days before the May 22 trial date Ingle and Adame informed Barcroft that they no longer wanted him to represent them, and that they would defend themselves rather than have his continued representation. At the commencement of the trial Barcroft advised the court of this situation, and asked to be relieved of responsibility. The court carefully questioned, cautioned, and advised each of the defendants as to the peril involved in this decision upon their part. Each stated that he wanted to proceed on his own behalf. [Emphasis added.]

"Ingle relies on People v. Robinson, 42 Cal.2d 741,

745-747 [269 P.2d 6], and Glasser v. United States, 315 U.S. 60, 75-76 [62 S.Ct. 457, 86 L.Ed. 680], in support of his contention that he was deprived of the undivided assistance of counsel, and that a choice between having counsel representing conflicting interests and the accused representing himself was not really a free choice. This is not a case in which a trial court has appointed joint counsel over objection on the ground of diversity of interest between the co-defendants. [Citations omitted.] Nor was counsel forced upon two nonconsenting defendants. Here counsel had requested on unspecified grounds that he be relieved of his appointment over two months before trial. Ingle had several opportunities in court to express his dissatisfaction with counsel, to indicate that there might be some conflict of interest, or to request a postponement of the trial date as set, to obtain independent counsel. When he did object on the morning of the trial he did not indicate that the interests of himself and Adame were in conflict, and the circumstances were not such as to indicate to the trial judge that there was any conflict. When the right to counsel has been freely and intelligently waived, an accused has not been deprived of the right to representation by counsel. [Citation omitted.] The dilatory tactic indulged in by

Ingle in this matter is of itself sufficient from which to imply a waiver of right to independent counsel. [Citation omitted.]"

After a close examination of the record the California Supreme Court rejected petitioner's contention and the Federal District Court after an independent examination of the record did likewise. Appellee urges that the opinion and conclusion of these courts should be adopted.

III.

APPELLANT WAS NOT DENIED COMPULSARY PROCESS FOR OBTAINING WITNESSES.

Appellant raised this same contention before the California Supreme Court. After due consideration of the record, that court rejected the argument by saying at page 417:

"With reference to the claimed denial of the appellant's right to the process of court to compel the attendance of witnesses, the clerk's transcript contains a document entitled 'Request for Subpoenas' which lists the names of several persons. It is unsigned. No request was made at the trial for a continuance to secure the attendance of Garcia or of any other witness. The record is devoid of anything to show that the trial court was at any time cognizant of or refused to honor the request for process." People v. Ingle, supra, at 417.

Appellant made no request to the court for process to obtain any further witnesses, nor did he in any way bring the matter to the attention of the court, thus, appellee submits that appellant's contention herein must be rejected.

CONCLUSION

For the foregoing reasons, the appellee respectfully submits that the order of the District Court denying appellant's petition for writ of habeas corpus should be affirmed.

DATED: October 20, 1966.

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

Ronald H. Kearney
RONALD H. KEARNEY
Deputy Attorney General

RHK:lp
65-1961
CRSF

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: October 20, 1966.

Ronald H. Kearney
RONALD H. KEARNEY
Deputy Attorney General

RHK:lp

No. 21113

United States Court of Appeals

For the Ninth Circuit

DAVID R. GOLDEN, *Appellee*,

vs.

RICHARDSON-MERRELL, INC., a corporation, *Appellant*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

GEORGE H. BOVINGDON
Attorney for Appellant.

ORVIN H. MESSEGEE
Of Counsel,

1111 Hoge Building
Seattle, Washington 98104
MAin 2-0494

THE ARGUS PRESS, SEATTLE, WASHINGTON

No. 21113

United States Court of Appeals

For the Ninth Circuit

DAVID R. GOLDEN, *Appellee*,

vs.

RICHARDSON-MERRELL, INC., a corporation, *Appellant*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

GEORGE H. BOVINGDON
Attorney for Appellant.

ORVIN H. MESSEGEE
Of Counsel,

1111 Hoge Building
Seattle, Washington 98104
MAin 2-0494

THE ARGUS PRESS SEATTLE WASHINGTON

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CASES

TABLE OF CASES

TABLE OF CASES

TEXTS

STATUTES

STATUTES

United States Court of Appeals
For the Fifth Circuit

DAVID R. GOLDEN, *Appellee*, vs. RICHARDSON-MERRELL, INC., a corporation, *Appellant*.	No. 21113

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

FACTS OF JURISDICTION AND RESUME OF PLEADINGS

Plaintiff-appellee, David R. Golden, a Washington State resident, brought suit for $250,000.00 against defendant-appellant, Richardson-Merrell, Inc., a Delaware corporation[1] and manufacturer of drugs, under authority of 28 USC 1332. This court is vested with appellate jurisdiction (R. 13, Tr. 1539) under 28 USC 1291.

Appellee's Amended Complaint (R. 13) as modified by pre-trial order (R. 78) generally alleged that, as a result of taking a physician-prescribed cholesterol inhibiting drug, known as MER/29, which was manufactured by appellant,[2] appellee suffered ". . . eye disease and cataracts, damage to his scalp and hair, damage to

[1] Although jurisdictional facts were not pleaded originally (R. 1 and R. 13), diversity of citizenship is stated to exist in par. I of pre-trial order (R. 78).

[2] Actual production of MER/29 was by a subsidiary, Wm. S. Merrell Co., Cincinnati, Ohio.

his skin . . ." etc.; that appellant was liable to appellee on the theory of (1) negligence (first cause of action) (2) express and implied warranties (second cause) and (3) fraud (third cause of action) (R. 13).

Appellant denied liability under all of these theories (R. 23).

STATEMENT OF THE CASE

A. Underlying Disease

Atherosclerosis (hardening of the arteries) is characterized by the formation of "plaques" in the arteries, and according to Dr. Miller, appellee's attending physician,[3] it was felt by him "and by doctors generally that there is a relation of cholesterol to the formation of atherosclerotic plaques" (Tr. 55). "As is generally known, there is a great concern in this country in regard to heart disease . . . and there is a great deal of experimental work going on in this field, that there is a feeling . . . that cholesterol and fat have something to do with . . . heart attacks" (Tr. 56). Indeed, "it (atherosclerosis) is one of the most, if not the most, important single diseases in humans in this country"[4] (Tr. 1393).

B. Brief History of MER/29

Responding to this concern, appellant's research chemists, having undertaken the challenge in 1952, produced hundreds of related compounds by "molecular manipulation" over the next several years until finally

[3] He had attended appellee since April of 1955 (Tr. 36, l. 3).

[4] This description by Dr. J. Earle Estes, 12 years on staff of Mayo Clinic and past-president of American College of Angiology (Tr. 1391).

MER/29 was synthesized in 1956 (Tr. 1104-1107). It was first subjected to extensive laboratory animal testing, and in 1958 and 1959 selected clinical investigators, such as Dr. J. Earle Estes of the Mayo Clinic, treated consenting cardiovascular patients with the new drug on an experimental basis[5] (Tr. 1396-1404). A new drug application was filed with the Food and Drug Administration in July, 1959 under the then[6] provisions of 21 USC 355, and the drug was approved for prescription sale in April of 1960 (Tr. 1646, ll. 12-14).

C. Labeling of MER/29

The labeling of MER/29, approved by the FDA for dissemination to physicians, and to be included in the packages sent to pharmacists, stated, *inter alia*:

> "MER/29 is well tolerated at a dose of 250 mg. daily. Infrequent side effects have occurred but their incidence is too low for positive correlation with administration of the drug. Isolated reports have been received of nausea, vomiting, temporary vaginal bleeding, and dermatitis.
>
> "Hypercholesterolemia and its associated conditions may require MER/29 therapy over a long period. MER/29 has been shown to be entirely safe in the periods the drug has been studied, but long-term or lifetime effects are unknown. Periodic examination of patients on long-term MER/29 therapy is therefore necessary.
>
> "While clinical liver damage has not been encountered, periodic liver function tests may be desirable until more long-term safety data are available." (Ex. A-1, Tr. 1229)

---

[5] These clinical investigators conferred on their experiences at Princeton, N.J., December, 1959 (Tr. 1403).

[6] 21 USC 355 was amended by Sec. 101-104 of Public Law No. 87-781 October 10, 1962, 76 Stat. 780. For text of 21 USC Sec. 355 at that time in effect, see Appendix A herein.

D. Eventual Withdrawal from Market

After appellant's medical research department had investigated reports of hair loss by some patients, it proposed to the FDA and was permitted to include a "thinning of the hair" warning. Later, on December 1, 1961, having verified the possible relationship of lenticular opacities in certain patients to ingestion of the new drug, appellant proposed to the FDA and was permitted to send a warning letter to all physicians (Ex. A-5, Tr. 1191).[7] Additional reports of cataracts in early 1962 resulted in recommendation by appellant's medical staff that the drug be withdrawn from the market and, accordingly, appellant discontinued sales in April, 1962. Formal suspension of the "effectiveness of . . . (the new drug) application" was ordered by the Secretary of Health, Education and Welfare on May 22, 1962, under 21 USC 355 (e) (1)[8] (Tr. 1646).

During its period of marketing, some 442,000 patients had taken MER/29 (Tr. 1149-50). All side effects combined affected substantially less than 1% of those treated (Tr. 1224). The drug was admittedly effective in reducing cholesterol[9] (Tr. 154, ll. 18-20).

---

[7] The jury was entitled to find this letter was not received by appellee's physician (Tr. 176, ll. 14-15).

[8] 355 e (1) covers suspension based on a finding "that clinical experience, tests by new methods, or tests by methods not deemed reasonably applicable when such application became effective show that such drug is unsafe for use under conditions of use upon the basis of which the application became effective, . . ." 21 USC Sec. 355 (e) (1).

[9] This opinion of appellee's doctor was shared by all the medical witnesses who were asked, although reluctantly by appellee's witness, Dr. Loomis (Tr. 516, ll. 18-21).

E. Plaintiff-Appellee's Reaction

Appellee, David R. Golden, patient of Doctor Milton J. Miller (both of Seattle, Washington), was one of those few who apparently suffered side effects. He was placed on MER 29 therapy on September 27, 1960. Following his prescribing the drug, Dr. Miller saw his patient on December 1, 1960, and once again on September 11, 1961, until, by telephone, he ordered discontinuance on March 28, 1962 (Tr. 93, ll. 14-16).

> "Mr. Golden called on March 28, 1962, and stated that his skin was becoming dry and he was advised to stop MER 29." (Tr. 93)

Thereafter, a "folliculitis"[19] of his skin allegedly was changing from a blonde color to gray" (Tr. 98). He was hospitalized twice for the folliculitis (Tr. 100-103, 111-112). On February 18, 1963, he told Dr. Edward Schwartz, an opthomologist to whom he had been referred, that his vision had been getting progressively "blurry" for four or five months. Early cataracts were then diagnosed (Tr. 118-119). Later, on May 18, 1963, he was seen by another opthomologist, Dr. Leland Watts (Tr. 122, 531), who surgically removed the cataracts from the left eye June 26, 1963, and from the right eye August 14, 1963. He was fitted with contact lenses which restored visual acuity to 20-20 (Tr. 554) but the surgery left him deficient in accommodation to range, protection against light, sensitivity, peripheral vision,

---

[19] "Inflammation of a group of follicles." New Gould Medical Dictionary First Edition 1951.

physical appearance of the pupil (Tr. 555, 560, 561), developed (Tr. 96), and "his hair was receding and . . . and left him more subject to later glaucoma and retinal detachment than the average person (Tr. 565).

Dr. Watts was clear in his opinion that appellee's cataracts were related to MER/29 ingestion (Tr. 542) although he conceded that he did not necessarily mean that the drug itself was toxic (Tr. 569-570). This doctor admitted that appellee's were the only cataracts, so related, that he had ever seen (Tr. 549). He removed "25 to 30 cataracts a year" (Tr. 567).

F. The Trial

Trial of this action commenced March 21, 1966, and ended April 6, 1966. A considerable portion of the testimony was by way of depositions taken in New York both by appellant and by representatives for a national plaintiff's "group"[11] of which appellee's counsel is a member.

A considerable portion of the evidence consisted of reports of data submitted to the FDA as part of the appellant's new drug application[12] and testimony in respect thereto.

At the outset of the trial (Tr. 4) appellant requested "ground rules" that would exclude any evidence going to the issue of fraud on the part of appellant based on

[11] (Tr. 780, ll. 12-13; Tr. 781, ll. 9 and 10).

[12] The New Drug application consisted of five volumes of material. It was from this mass that certain omissions and inaccuracies in reporting were alleged to exist (Tr. 213, l. 25).

alleged omissions or inaccuracies in its reporting to the FDA and urged that the Court "ought not to permit the jury to speculate as to what the Food and Drug Administration might have done if they had some tests that were not turned into the Food and Drug Administration" (Tr. 4, ll. 22-25).

Later, motions for a directed verdict on the issues of fraud and both express and implied warranty were made at the close of plaintiff's case in chief and, after both parties had rested, on the ground of insufficiency of the evidence, and that implied warranty properly should not be applied to a prescription drug case. All of these motions were denied (Tr. 993, 1007, 1532).

Instructions were given the jury on all of plaintiff's theories including the theory that the jury might find damages to the plaintiff as a result of either fraudulent reporting of data to the FDA or negligence (Tr. 1659, l. 15-Tr. 1660, l. 21).

The jury returned a verdict for appellee in the amount of $150,000.00 (R. 140) upon which judgment was thereafter entered (R. 141).

Motion for Judgment NOV or for New Trial was made under FRCP Rule 50 (b) 28 USC (R. 145-147) and thereafter denied on April 25, 1966 (R. 150).

This appeal follows (R. 152).

SPECIFICATION OF ERROR No. 1

The District Court erred in submitting that portion

of its charge, reading in *totidem verbis*:

> "The laws of the United States require that before the defendant could sell MER/29 to the public it must file what is called a 'New Drug Application' with the Food and Drug Administration which application shall contain full reports of all investigations which have been made to show whether or not such drug is safe for use and if you find that the defendant failed to make full reports of all investigations it made of the drug MER/29, at the time it filed its New Drug Application or the supplement thereto, then such failure on the defendant's part in violation of the law, would be negligence, *per se,* for which the defendant would be liable to the plaintiff for any damages proximately resulting therefrom and because of the defendant." (Tr. 1659-1660)

At the time of the trial, and before the jury retired to deliberate, appellant noted the following objection:

> "Except to the Court's instruction to the jury that the jury may find damages for the plaintiff consequent upon any negligence of filing inaccurate data on the part of the defendant in the Food and Drug Administration, if they find that such resulted in damage to the plaintiff. Now, the evidence indicates this, and I think it is substantially uncontroverted that the defendant promulgates certain types of condensed reports quite incidental in literature that accompanies its products. The literature included a great deal more and greater emphasis, of course, was placed upon the clinical work in advising physicians of this. Now, the point of this, this permits the jury to speculate as to a possible connection between inaccurate reporting. There is no direct evidence of such connection, and this invitation to speculate is, we submit, erroneous and prejudicially so.
>
> "THE COURT: Allowed." (Tr. 1686)

As a matter of law the evidence is not sufficient to establish that plaintiff was damaged by inaccurate reporting to the FDA, and the jury, by the giving of this instruction, was invited to speculate that the labeling approved by the FDA would have contained results of omitted tests, etc., and that this additional or different material would have caused the plaintiff's doctor to forego prescribing MER 29.

SPECIFICATON OF ERROR No. II

The District Court erred in submitting that portion of its charge reading in *totidem verbis,* as follows:

> "Plaintiff contends that defendant practiced fraud upon the Food and Drug Administration in respect to animal testing.
>
> "I instruct you that the nature of proof to support such a claim of fraud is different from the proof of most other issues. The evidence must be clear, cogent and convincing. In this case, before you can find that fraud existed or occurred as alleged by plaintiff, it is necessary that by clear, cogent and convincing evidence you find that each and all of the following elements of fraud existed or occurred, namely:
>
> (1) A representation of existing fact;
> (2) Its materiality;
> (3) Its falsity;
> (4) The speaker's knowledge of its falsity;
> (5) His intent that it shall be acted upon by the person to whom it is made;
> (6) Ignorance of its falsity on the part of the person to whom the representation is made;
> (7) The latter's reliance on the truth of the representation;
> (8) His right to rely upon it; and
> (9) His consequent damage." (Tr. 1665, line 6 through 1666, line 3)

At the time of trial, and before the jury retired to deliberate, appellant noted the following objection to the above charge:

> "Except also to that instruction which advises the jury that they may find fraud on the plaintiff by virtue of the accused and purportedly proved fraud on the department. It is somewhat in the same vein as the previous one,[13] but with this additional interpretation. Raw data is submitted to the department. It is analyzed and it is scrutinized, examined, and then the department either says this is adequate or this is not adequate, then when the time comes for there to be made printed matter that is part of what is called labeling and in no case that there is *hair* (*sic,* 'here') is there any labeling showing any tendency whatever the slightest tendency to indicate that any fraud, inaccuracy or by whatever name one desires could be in this was intended to be made to any individual outside the Food and Drug Administration and the permission to let them speculate is equally offensive *if* (*sic,* 'in') this as it was in others and it is offensive more for the reason that there is no cause of action on fraud flowing to this plaintiff as was pointed out in our previous contentions as a matter of law. (Interpolations added)
>
> "THE COURT: Allowed." (Tr. 1686-1687)

This charge could only be construed by the jury to mean that the plaintiff might recover if it found that the reported data which formed a part of the New Drug Application contained inaccuracies or misrepresentations or was not complete, even though whatever remote and indirect reliance by plaintiff might be found, the same would necessarily require speculation that, except for these inaccuracies, misrepresentations and omis-

[13]The reference was to the instruction set out in Specification 1.

sions, the marketing of the drug would not have been approved, or that the labeling would have been different.

SPECIFICATION OF ERROR No. III

The Court erred in denying defendant's motion for a directed verdict on the issue of fraud, particularly as to fraud on the FDA made at the close of plaintiff's case. This motion may be found at page 993 of the transcript, lines 2 through 12 and reasons given in support thereof from Tr. 993, line 13 through Tr. 1004, line 4.

SPECIFICATION OF ERROR No. IV

The Court erred in denying defendant's motion for a directed verdict on the issue of fraud, particularly as to fraud on the FDA, made at the close of all of the evidence. This motion and the reasons given therefor appear from page 1532 of the transcript, line 19 through page 1534, line 18.

SPECIFICATION OF ERROR No. V

The Court erred in denying the defendant's motion for a directed verdict on the issue of express warranty made at the close of plaintiff's case. This motion may be found on page 993 of the transcript and the reasons given in support thereof at pages 1004, line 5 through 1007, line 17.

SPECIFICATION OF ERROR No. VI

The Court erred when it denied the renewal of the motion described in Specification No. V at the close of all the evidence. This motion may be found from page

1532, lines 19 through 24 and the argument in support thereof from pages 1535, line 19 through 1537, line 2 of the transcript.

SPECIFICATION OF ERROR No. VII

The Court erred in denying defendant's motion for a directed verdict on the issue of implied warranty at the close of plaintiff's case. This motion may be found at page 993, lines 2 through 12 of the transcript and the argument thereon at page 1007, lines 16 through 25.

SPECIFICATION OF ERROR No. VIII

The Court erred when it denied the renewal of the motion described in Specification No. VII at the close of all the evidence. This motion may be found from page 1532, line 19 through 24 and the argument in support thereof from pages 1535 line 19 through 1537, line 2.

SPECIFICATION OF ERROR No. IX

The Court erred when it admitted in evidence over the strenuous objection of the appellant promotional material of the appellant in the absence of proof that Dr. Miller, the prescribing doctor, relied on it or that Mr. Moberg, the representative of the appellant who called on the doctor, communicated said material to him.

ARGUMENT

Introduction to Argument

A shotgun blast into the twelve volumes of this record would doubtlessly hit a multitude of technical error. Despite how conscientious a trial judge may be, for him to conduct a trial of this length and escape all error would

require that he be unreal. Neither appellate courts nor litigants can expect as much. Certainly, that is why the test of any review is reduced to one of *prejudicial* error. And that is why we have aimed to avoid picayune herein and the prolixity which is its inevitable companion.

We must shamefully confess that, although some of the "shot" might have struck substantial errors, other than herein assigned, we must forego complaint because we were human too, and proper foundation in some instances was overlooked.

Because of the nature of the errors herein specified, we have felt bound to furnish a record of the trial in its entirety.[14] We do not envy the court's task in reviewing this record. At the same time, although ever mindful that review of the errors herein considered will be based upon an acceptance by the court of appellee's *most favorable evidence*, we still feel that a review of the entire record will show the court the *sui generis* complexion of prescription new drug cases—their essential distinction from the usual food, drug or cosmetic case—where, as here, scientists work long and hard to produce a wholesome and unadulterated[15] drug that has an *action* on the human body that the medical profession eagerly *wants*, and then it turns out that the very action desired has apparently adversely affected some patients in

[14] *United States v. John H Estate* (CCA Hawaii 1937) 91 F.2d 93.

[15] It will be noted that the record is devoid of any evidence showing the least impurity.

other organs or bodily systems in a manner doctors did not expect.

Summary of Order of Argument

Specifications I and II both involve a common alleged deficiency in the evidence of causal relationship, between alleged negligent or fraudulent reporting of data to the FDA and the injury claimed, and to avoid repetition will be discussed together (Specifications III and IV relate to the same common issue, except only they concern denial of motions rather than complaint of instructions).

Specifications V and VI relate to mid-trial motions and VII and VIII to "end of trial" motions all involving either "express" or "implied" warranty and will be discussed under appropriate headings.

ARGUMENT ON SPECIFICATIONS I and II

Specifications I and II will be discussed together. The first concerns an erroneous instruction in respect to alleged *negligent* reporting to the FDA, whereas Specification II concerns an erroneous instruction respecting alleged *fraud* on the FDA. Obviously, in a case such as this, the element of reliance by a plaintiff required to be established in a fraud cause, is essentially the same as the required element of proximate cause in a negligence action. And, so far as a *legal* failure of proof of causation is concerned, both, it would seem, may suffer from the same broken link. We might here point out that the trial judge was well apprised of ap-

pellant's insistent contention that there was a legally fatal hiatus in the evidentiary chain of causation, specifically that the record was devoid of evidence that the FDA *would have suspended the new drug application or changed its labeling* if these alleged deficiencies in reporting data had come to its attention (Tr. 1000, l. 13-1004, l. 4 and 1532, l. 19-1535, l. 18). Over strenuous and repeated objections, the witness, Dr. William M. M. Kirby, erroneously was permitted to testify that the reporting of data to the FDA by appellant did not measure up to the standards of the agency (Tr. 824, l. 9-839, l. 8). Nevertheless he admitted that an evaluation of drug application data requires exercise of scientific judgment. At page 839, line 24 we find the following:

> "(By Mr. Kelleher) In the evaluation of the information one that (*sic*, 'that one') requires, (speaking of the FDA), is the evaluation of the information submitted by the companies an evaluation that requires scientific judgment?
>
> "A. Yes.
>
> "Q. Are you familiar with that standard of scientific judgment required?
>
> "Mr. Bovingdon: No, wait a minute. There are as many scientific judgments as there are men scientifically qualified.
>
> "The Court: That objection is sustained." (Tr. 839-840)

Assuming that the jury found as a fact that there were either *fraudulent* or *negligent* deficiencies and inaccuracies in appellant's reporting of data to the FDA, should it have been permitted to draw the *inference* therefrom, that, if these deficiencies or inaccuracies had been known, the agency would have acted *differently,*

and then, upon the basis of that *inference,* further *infer* that the plaintiff (or through his conduit, Dr. Miller) would have acted *differently,* so that the damage would not have occurred? Is this not a somewhat classical example of basing inference on inference?

"Presumption may not be pyramided upon presumption, nor inference upon inference." *Neel v. Henne,* 30 Wn.2d 24, 37, 190 P.2d 775, 782; *State v. Willis,* 40 Wn. 2d 909, 914, 246 P.2d 827-830; *Johnson v. Western Express Co.,* 107 Wash. 339, 181 Pac. 693; *Mumma v. Brewster,* 174 Wash. 112, 24 P.2d 438; *Ruff v. Fruit Delivery Co.,* 22 Wn.2d 708, 720, 157 P.2d 730; *Prentice Packing & Storage Co. v. United Pacific Ins. Co.,* 5 Wn. 106 P.2d 314.

Mindful, however, of the rule probably established by this Court in *Allen v. Matson Navigation Co.* (CA 9th 1958) 255 F.2d 273,[16] that "the sufficiency of certain evidence to raise a question of fact for the jury . . . should not be controlled by state law,"[17] we respectfully invite the Court's attention to the following federal cases:

O'Brien v. Equitable Life Assurance Society of U.S. (1954, CA 8), 212 F.2d 383, cert. denied 348 U.S. 835 99 L.Ed. 658, 75 S.Ct. 57; *Tucker v. Traylor Engineering*

[16]Applying either California or Federal law the evidence would have been sufficient.

[17]As explained by Prof. James Wm. Moore. this view is in constitutional obedience to Article III and the Seventh Amendment and the Erie doctrine becomes subservient. 5 Moore Fed. Practice, 2dEd. Sec. 38.10 p. 102.

and Mfg. Co. (CA 10 Okla., 1931), 48 F.2d 783; *Looney v. Metropolitan R. Co.*, 200 U.S. 480, 488, 26 S.Ct. 303, 50 L.ed. 564; *Byrth v. United States* (1964 CA 8) 327 F.2d 917, cert. denied 377 U.S. 931, 12 L.ed.2d 295, 84 S.Ct. 1333.

Concededly, the oft repeated statement that "inference may not be based on inference" has been questioned (Wigmore, Evidence 3rd Ed. Sec. 41), but while the clothes have been badly torn, the body remains intact.[18] Its mandatory *essence* persists. (See the 63-page annotation in 5 ALR 3rd 100.)

As stated in *Mitchell v. Machinery Center, Inc.* (1961 CA 10th), 297 F.2d 883, 885:

> "An inference is not a supposition or a conjecture, but is a logical deduction from facts *proved* and guesswork is not a substitute therefor." (Emphasis ours)

In *American Cyanamid Co., et al., v. F.T.C.*, 363 F.2d 757, 779 (CA 6, June 16, 1966), the Sixth Circuit Court vacated and remanded an order of the Federal Trade Commission, insofar as its decision held that the patent for tetracycline was issued as a result of improper conduct on the part of Chas. Pfizer & Co., Inc. and the American Cyanamid Co., on the grounds that there was not sufficient evidence. The Court, *inter alia*, said:

---

[18] In the (1966) ALR annotation, the annotator has stated that this "rule" has "shown amazing vitality." 5 ALR 3rd page 105.

"The Commission's holding of improper conduct in the Patent Office proceedings is based on its findings that false and misleading statements were made to the Patent Office and that material information was withheld, resulting in the granting of the tetracycline patent to Pfizer."

Acknowledging that "the findings of fact of the Commission must be accepted by this Court if they are supported by substantial evidence on the record considered as a whole," citing 15 USC 45 (c), the Court later, making its point socratically, asks:

"Would Lidoff's (the Patent Examiner) decision to grant the patent have been different if Cyanamid had revealed that it was in error in its prior assurances that there was no co-production of tetracycline in aureomycin? Or was he already aware of the facts which the Commission found to have been withheld by Cyanamid?

"Finally, the ultimate questions are: Did Lidoff receive all the information he requested from Pfizer? And was Lidoff misled and deceived by Pfizer and Cyanamid and did he grant the tetracycline patent as the result of such deception?

"It would seem that the answer by Examiner Lidoff to these questions might settle conclusively the issue as to whether Pfizer and Cyanamid made misrepresentations to the Patent Office and withheld essential information, thereby deceiving Lidoff into granting a patent which otherwise never would have been approved.

"Only Examiner Lidoff could have answered these questions. Yet the Commission failed to call him as a witness, although requested by petitioners to do so during the hearings. Instead the Commission introduced as a witness Mr. Manuel C. Rosa, Lidoff's superior in the Patent Office, who obviously could not answer questions concerning matters which were exclusively within the personal knowledge of Examiner Lidoff. Petitioners did not seek

> to subpoena Examiner Lidoff to testify as their witness, having been denied an opportunity to interview him in advance."

Then, after overcoming the Commission's argument that a Patent Office procedural regulation precluded use of the Examiner as a witness, the Court, returning to the "substantial evidence" question, states:

> "We find the decision of the Commission on this issue to be based on inferences and speculations and which are insufficient to constitute substantial evidence." Citing *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496; *N.L.R.B. v. Columbian Enameling & Stamping Co.*, 306 U.S 292, 300.

The instant appeal presents a striking parallel to the above-cited case. Dr. Talbot processed the appellant's new drug application and eventually made it effective by his letter dated April 19, 1960 (Ex. 95). He is the counterpart of Mr. Lidoff, the Patent Examiner, referred to in the language of the decision above-quoted. Paraphrasing the decision of the Sixth Circuit, would Dr. Talbot's decision to make the application become effective have been different if he had received all the information requested from Merrell or was he misled and deceived by Merrell and would not have granted the application as a result thereof? Only Dr. Talbot could have answered these questions. He did not appear as a witness.

The testimony of Dr. John O. Nestor, medical officer in the Food and Drug Administration, who assumed charge of MER 29 after it had been on the market a

year and three months, testified by deposition. He testified that he succeeded Dr. Talbot in October, 1961, after Talbot had left the administration (Tr. 712, 717, 727). He obviously would not have answered questions concerning matters which were exclusively within the personal knowledge of Dr. Talbot. Of course, Dr. Nestor was not permitted to so testify.

A fortiori, the instant evidence should be held insufficient to warrant the instructions given. The far greater remoteness from the *ultimate fact necessary to be established herein,* more than off-sets any arguable "quantum of proof" distinction based on the criminal nature of the cited case.

As pointed out in argument below, despite testimony during trial of Dr. John O. Nestor, *a medical officer in the Food and Drug Administration,* the Court was "treated to the interesting experience of having somebody else, in a *hypothetical* question, be asked to tell us what, in the circumstances, the FDA would have done or would not have done . . ." (Tr. 833, ll. 7-11). Of course, he was not permitted to so testify (Tr. 859, l. 19-860, l. 1). And even if it was proper (which we seriously question) for him to testify to his *opinion* that the quality of appellant's reporting was below the FDA standard, still such testimony is clearly ineffectual to close the gap of which complaint is herein made.

Moreover, we respectfully invite this Court's attention (at least in respect to the "fraud" instruction) to

defendant's Exhibit A-13 (Tr. 1372), the agency's order of May 22, 1962, formally suspending the New Drug Application (usually referred to in the record as the NDA) after the company's earlier withdrawal of MER 29 from the market on April 17, 1962 (Tr. 1646, ll. 17-19). This order states the findings upon which it is based as required by 21 USC 355 (e).[21] It will be noted that the suspension was under the language of subsection (1), "that clinical experience shows that MER 29 (triparanol) capsules are unsafe for use under the conditions of use upon the basis of which said application became effective." *The order was not based on subsection (2)*, "that the application *contains any untrue statement of a material fact*."

The last sentence of section (e) of 21 USC 355, *i.e.* that "(T)he order shall state the findings upon which it is based," would appear mandatory. Is there not a presumption that an agency of the Government complied with the law?

> "As to the first factor (where individual rights are concerned), almost without exception, courts have held that the determination of an administrative agency as to the existence of a fact or status which is based upon a present or past group of

[21] (e) The effectiveness of an application with respect to any drug shall, after due notice and opportunity for hearing to the applicant, by order of the Secretary be suspended if the Secretary finds (1) that clinical experience, tests by new methods, or tests by methods not deemed reasonably applicable when such application became effective show that such drug is unsafe for use under the conditions of use upon the basis of which the application became effective, or (2) that the application contains any untrue statement of a material fact. The order shall state the findings upon which it is based.

> facts which may not thereafter be altered or modified." *Olive Proration Program, etc. v. Agricultural P. Commission,* 17 Cal.2d 204, 109 P.2d 918 (1941).

True, the statement last quoted may be directed to the finality of administrative actions as respects the citizen and the agency. Yet, when there is ever present such a strong presumption that public officers have performed their duty (see scores of cases digested in 21 Modern Federal Practice Digest, Evidence, Sec. 83 (1)), does not a third party, a stranger to the agency action, bear a heavy oar? Particularly, should not this be so when the duty-prescribed act of the agency required to be refuted is, in effect, its very act of exculpating from fraud the party with whom it dealt?

Interestingly, appellee took exception to the same instruction on fraud as is the basis of appellant's complaint in Specification IV. Apparently fearful of appellate scrutiny, appellee raised the point that the instruction *was proposed by appellant* — perhaps hoping to immunize his case from error by resort to the well-established rule that a party waives his right to object to instructions which he has proposed.

We might prophylactically answer this anticipated position by pointing out that appellee, throughout the trial, made it abundantly clear to the trial judge that the jury should be permitted to find that a proximate cause of appellee's injuries was the alleged fraud perpetrated on the FDA or the alleged negligent reporting of data.

Of the disputed facts alleged by plaintiff, as summarized by the Court we find:

> "9. That the defendant falsified and omitted data known to it in its New Drug Application. That some of such falsification and omission may have been willful; some of it may have been negligent.
>
> * * *
>
> "13. That the above-mentioned falsifications, omissions, concealments and statements were made with the intent of causing the New Drug Application named as NDA to become effective so that defendant could market MER 29. And that *as a result thereof, the NDA became effective* and defendant was allowed to market MER 29." (Tr. 1649-1650) (Emphasis ours)

In stating the issues for the jury's determination, the Court charged:

> "Another Issue of Fact for the jury's determination: Was there any fraud, deceit or concealment practiced by the defendant?
>
> "Another such issue for your determination is: If there was any fraud, deceit or concealment practiced by the defendant, did it result in any damage to the plaintiff?"

In answering a leading question (not objected to) Dr. Miller, appellee's treating physician, testified to his reliance on FDA approval.

> "Q. (By Mr. Kelleher) When you prescribed this drug for Mr. Golden, upon what did you rely? Will you give us what, or several things upon which you relied for that information and knowledge on your part as to the efficacy of the safety of the drug?
>
> "A. First of all, the drug needs to be approved by the Federal Drug—Food and Drug Administration, and I feel if it has been approved by them it

is a safe drug . . ." (Tr. 135, l. 22-136, l. 5)

No doubt to energize the causal conduit, and despite some strain on one's credulity,[22] we find appellee (the patient) testifying:

> "Q. In taking this drug, what did you rely on?
> "A. I relied on Dr. Miller and the government.
> "Q. How do you mean the government?
> "A. Dr. Miller indicated to me that this drug had been approved.
> "Q. By whom, did he say?
> "A. It had been approved by the Federal Drug Administration." (Tr. 627, ll. 9-16)

In responding to argument in support of a directed verdict on the issue of fraud, appellee's counsel was invited by the Court to

> ". . . point out compliance with each one of the requirements[23] as set out in Williams v. Joslin in the State Court, under the state rules, that is in 65 Washington 2nd begining 696 —" (Tr. 1015, ll. 19-23)

In answering the Court's request, counsel went through the first eight of the nine requirements—with the *FDA* for the most part *in the role of the person defrauded* (Tr. 1016-1020). Then as to the *ninth* requirement, as if by some legal legerdemain, he deftly closed the causal chasm by the following statement:

> "I think the law is quite clear that Mr. Golden is

[22]Earlier on deposition appellee testified as appears at (Tr. 628, ll. 1-7). The discrepancy was not explained but we realize the jury was not bound to consider this circumstance.

[23]These are the 9 requirements set forth in the court's instructions set forth under Specification II, *ante*.

> entitled to rely upon the Food and Drug Administration as a citizen to protect him on questions of toxicity at that time from drugs and he did so rely." (Tr. 1020, ll. 22-25)

We respectfully suggest that what appears to be appellee's present predicament simply stems from "overselling" a conscientious trial judge on this theory of causal relationship. The job of "selling" apparently was so well done that, despite both parties excepting to the same instruction, at a time when the jury had not yet retired, this instruction was not withdrawn. The exception made by appellee has the flavor of a tardy, post-action, "I didn't really mean it" response, *i.e.* the instruction

> "injected into the case an element which, *while plaintiff's counsel believes is the law*, is nevertheless *not already established* law . . ."

When one party, throughout a trial, insists on a certain legal position, succeeds in convincing the Court to adopt that position as correct, and the Court makes clear that there will be an instruction given thereon, has the opponent, who vigorously, but unsuccessfully, resisted the adoption of such position by the Court, waived his right to object to such instruction because it was submitted by him? Unless substance be completely subordinated to form this question must be answered, "No." And the cases so hold:

Sorensen v. Western Hotel, Inc. (1960) 55 Wn.2d 625, 349 P.2d 232; *Folden v. Robinson* (1961) 58 Wn.2d

760, 364 P.2d 924; *North Chic. Elec. Co. v. Peuser* (1901) 190 Ill. 67, 73, 60 N.E. 78.

The first cited case is not too unlike the case at bar. On page 637 (349 P.2d 240), the Washington Court says:

> "The plaintiff vigorously and plausibly argues that having requested and failed to except to an instruction which says, 'You are instructed that the ramp was maintained in violation of the Ordinances passed by the City of Bellingham,' that instruction became the law of the case, see *Schneider v. Noel* (1945), 23 Wn.2d 388, 160 P.2d 1002.
>
> "(6) We have held that an adequate exception to one of two or more instructions subject to the same error is sufficient to challenge the consideration of the trial court, which is the purpose of the exception, and to bring the question here for review. *Crutcher v. Scott Publishing Co.* (1953), 42 Wn.(2d) 89, 104, 253 P.(2d) 925; *Franks v. Department of Labor & Industries* (1950), 35 Wn.2d 763, 770, 215 P.(2d) 416. *The added element in this case is that appellant proposed the quoted instruction.*
>
> "(7) The purpose of the rule requiring exceptions to the instructions is to advise the court of the error claimed. If there was anything in this trial, as to which the plaintiff and the trial court were well advised, it was that the defendant hotel was contending that the 1953 ordinance adopting the uniform building code was not retroactive in its application, and that it was not applicable to the ramp on which the plaintiff slipped and fell. The trial court had ruled that the ordinance was applicable; had admitted it in evidence over strenuous objection; had indicated his intention to give instructions Nos. 6 and 7, to which we have referred, despite the plaintiff's exceptions thereto. It is clear that instruction No. 8 was a proximate-cause instruction, and the defendant had nothing left to

argue about, except proximate cause. Instructions Nos. 6 and 7 amounted to a directed verdict, if the grade of the ramp and the absence of hand rails was a proximate cause of the plaintiff's slip and fall. Under these circumstances, the defendant hotel waived nothing by requesting instruction No. 8. As the supreme court of Illinois said in *North Chicago Electric Ry. Co. v. Peuser* (1901), 190 Ill. 67, 73, 60 N.E. 78,

"' . . . Being unable to induce the court to instruct the jury according to its view of the true legal principle affecting its right; the appellant company then presented a series of instructions embodying the theory of the law on the point as held by the court, as the most favorable declaration from the court to the jury possible to be obtained. The appellant company was not required to abandon all chances of a favorable verdict because the court would not grant an instruction to which it believed it was entitled. Without impropriety or the loss of the right to complain of the refusal of the court to declare the law as the company believed it to be, counsel for the appellant company might prepare instructions applicable to its cause in that view of the law which the court had announced that it entertained.

"'The appellant company was powerless to combat the view of the court otherwise than by excepting thereto and preserving such exceptions, as was here done. The position in the trial court and in this court are in nowise inconsistent. It urged there the same theory of the law that it urges here, and it is nowise at fault for the error which occurred, and consequently not estopped.'

"See also *Wallner v. Chicago Consolidated Traction Co.* (1910), 245 Ill. 148, 153, 91 N.E. 1053.

"The defendant hotel only asked for an instruction as to proximate cause embodying the trial court's theory of the law which had been chosen over the objection of the defendant. The appellant neither mislead nor invited the court into error; there was no waiver and no estoppel." (Italics ours)

Also, see 89 C.J.S., Trial, Sec. 668, and *Williams v. Powers* (CCA Ohio, 1943) 135 F.2d 153.

It will be noticed that the *Sorenson* case considers as sufficient an objection to one of two instructions, both of which concern a common objectionable feature. This makes sense if the purpose of objecting to instructions is truly and genuinely to apprise the trial judge of error claimed.

And, of course, there could be no question of proper apprisal here considering appellant's arguments on its motions under FRCP 50a (Tr. 993 *et seq.*, 1532 *et seq.*).[24]

Another way of analyzing the question of legal sufficiency of the evidence to establish causation is to go directly to the substantive law governing proximate cause. When this is done, again it remains clear that the required legal proximity of relationship did not exist. One may simply ask the hornbook type question, "Was the alleged negligent act of reporting incomplete or inaccurate data to the FDA a necessary and indispensable antecedent to the harm that resulted?" The answer, obviously, is "No."

The Supreme Court of the State of Washington has *expressly* refused to substitute the "materially contrib-

---

[24]Query? When there is no "matter to which he objects" in an instruction, but complaint is simply that the issue covered should not be submitted and his position has been made clear, does Rule 51 even apply? See, application of the Washington Court Rule RPPP 51.16W in *Greenwood v. The Olympic, Inc.*, 51 Wn.2d 18, 315 P.2d 295.

uted" or "substantial factor" test either as a definition of or as a substitute for "proximate cause." *Blasick v. Yakima*, 45 Wn.2d 309, 274 P.2d 122. And see *Gardner v. August Seymour*, 27 Wn.2d 802, 180 P.2d 564; *Mathers v. Stephens*, 22 Wn.2d 344, 156 P.2d 227; *Everest v. Rilkan*, 26 Wn.2d 542, 174 P.2d 762.

ARGUMENT RE SPECIFICATIONS III and IV

These specifications, which are based on claimed error in denying defendant's motions for a directed verdict on the issue of fraud, particularly as related to fraud on the FDA, we feel are amply covered by the preceding argument respecting specifications I and II. We might add only, that in arguing these motions, appellant made known to the Court his objection to the Court's theory of causal relationship which of course would apply whether the act of misreporting data to the FDA were either fraudulent or *negligent*. Specifically, we call this Court's attention to page 1000 of the transcript, l. 19 through page 1002, l. 18 and page 1003, l. 21 through page 1004, l. 4. Also page 1534, ll. 6-10, ll. 18-23, and page 1535, ll. 14 through 18.

ARGUMENT ON SPECIFICATIONS V, VI, VII and VIII

A. First, Did the Evidence, Viewed in a Light Most Favorable to Plaintiff, Warrant the Submission of the Issue of *Express* Warranty?

Appellee testified:

> "Q. . . . How did you accomplish the refilling of the prescriptions?

"A. The doctor would call the druggist and direct him to refill the prescription.

"Q. And you in turn would call the doctor by phone and say you were out?

"A. That is correct." (Tr. 622-623)

"Q. Is it true, sir, then that you never saw the folded piece of paper which you now hold in your hand which was A-1 for identification or the box in which it was contained?

"A. I never saw the folded piece of paper or the box which it was contained in, prior to seeing it in this court room." (Tr. 614)

In respect to Exhibit 13:

"Q. So each and every time you got a bottle of those it would be in the same form as that?

"A. That is correct." (Tr. 13)

As will be seen, Exhibit 13, the "re-package," was as described by Dr. Miller on pages 145 and 146. The original package (Ex. A-1) insert

"tells the composition of the drug, the advantages of the drug, how the drug acts, the clinical results, discussion of the drug, side effects, the pharmacology of the drug, the indications for the drug, the cautions, and the use of the drug, the dosage and administration and package information and references." (Dr. Miller, Tr. 146-147)

This brochure

"is ordinarily not given (to the patient) unless the doctor orders that it be given."

He did not order it given to Mr. Golden (Tr. 147-148). Ex. A-1 was the form in which appellant's product was sold to pharmacies (Tr. 1229).

From the foregoing testimony it clearly appears (and a search of the entire record confirms) that at no

time were any express warranties made to appellee by appellant, certainly no privity existed between them and, moreover, the packaged product sold by appellant to the North City Pharmacy was not even the same package that North City Pharmacy sold to appellee.

The law of the State of Washington, although threatened[25] with some future "once and for all" destruction by the court itself, *continues* to be that, if there is no contractual privity attending a sale, there can be no warranty, express or implied. The exceptions that have been engrafted since *Mazetti v. Armour*, 75 Wash. 622, 135 Pac. 633, in 1913, and especially since *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, in 1932, concededly have been numerous and they are said to fall into three categories: (1) where the article causing the injury is of a noxious or dangerous nature, (2) where fraud or deceit has been shown on the part of the offending party, (3) where the manufacturer has been negligent in some respect with reference to the sale or construction of an item not imminently dangerous. *Cochran v. McDonald*, 23 Wn.2d 348, 161 P.2d 305 (1945); *Dobbin v. Pac. Coast Coal Co.*, 25 Wn.2d 190, 170 P.2d 642 (1946); *Kramer v. Carbolineum Wood Preserving Co.*, 105 Wash. 401, 177 Pac. 771 (1919); *Kasey v. Suburban Gas Heat*, 60 Wn.2d 468; *Dimott v. Ernie Majer, Inc.*, 55 Wn.2d 385, 347 P.2d 1056.

Such cases that may appear to the contrary have re-

[25] *Freeman v. Navarre*, 47 Wn.2d 760, 289 P.2d 1015.

sorted usually to the fiction of agency. See, *Freeman v. Navarre,* 47 Wn.2d 760, 289 P.2d 1015 (1955), and *Wisdom v. Morris Hardware Co.,* 151 Wash. 86, 274 Pac. 1050 (1928). Obviously, the pattern of "agency" to which resort was made in those cases does not fit the quadric relationship between plaintiff, defendant, pharmacy, and doctor herein.

Of course, the presently existing state law governs. 28 USC 1652; *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64, 58 S.Ct. 816, 82 L.ed. 1188. And, it is respectfully suggested that, although this Court must use "its best judgment" of what the Washington Court would hold, absent any pronouncement on the law (*Tavernier v. Weyerhaeuser Co.,* 309 F.2d 87), still, this rule should not obtain where the law has been pronounced, albeit criticized, but not yet overruled.

B. Evidence of the *Composite* Representation *Legally Negates* Express or Implied Warranty

Apart from a clear lack of privity, is the *complete* picture (using only *appellee's* evidence, together with *admitted* and *uncontroverted* facts) of the representations, including conditions, qualifications, and recommendations for use of the product, such as to *legally* support either an express or implied warranty in this case where the subject matter of the representations is a *prescription new drug?*

Assuming arguendo, that established reliance by the doctor is reliance by the patient, let us first examine the

admitted representations *in toto*. Dr. Miller's own testimony reveals:

As to his first meeting with a detail man (drug salesman) on February 17, 1960,

> "A. I am not too clear as to what was said at the various times that I saw the detail man from Merrell, but I do recall that, and I believe that this was on February 17, 1960, that the detail man informed me about this drug that was going to be introduced to the medical world that would be used to lower the blood cholesterol and I believe that this was on February the 17th, 1960, but I am not certain of this." (Tr. 68, l. 25-69, l. 8)

On July 12, 1960,

> "A. Yes, I do remember about that. Two of the detail men from Merrell came in this day and they gave me a brochure explaining about MER-29, and we discussed this medication and its role in lowering of the cholesterol metabolism and the lowering of cholesterol, and they spoke very favorably of the medication and certainly then sounded like a very important thing." (Tr. 69, ll. 15-22)

On that occasion the doctor was delivered Exhibit 2 (Tr. 70). Animal tests were not discussed on either of these occasions (Tr. 74).

At one of those earlier meetings apparently,

> "A. They told me that as far as their knowledge was concerned, and the company knowledge, that this drug was very free of toxic or side effects and in that it could be used safely." (Tr. 74, ll. 20-23)

The doctor next saw the detail man on September 12, 1961 and described this meeting as follows:

> "A. I think that this was just a routine call and

> I don't remember what was discussed except that I am, I don't recall of any mention of any side effects from MER/29, and I know every time—I am generalizing now, but every time I did see the Merrell man we did discuss the effects on the cholesterol and agreed that it was effective in lowering cholesterol to a certain degree, and I know also in a general way that I always asked the detail man about possible side effects." (Tr. 82, ll. 2-11)

Between September 12, 1961 and the next call of the detail man on October 17, 1961, one of the doctor's patients brought him a McCall's magazine article (Ex. 5) which mentioned hair and skin changes in connection with MER/29 therapy (Tr. 82-86). At the October 17, 1961 meeting he discussed the article with the detail man, believed to be Mr. Moberg, and

> "He told me *to his knowledge* there were no serious side effects to this medication, and that I could prescribe it with a feeling of safety." (Tr. 86, ll. 12-15)

At the final meeting testified to, December 12, 1961,

> "A. I think our conversation had been very similar as to what it had been in the past: MER/29 was a safe medication to take, and that it was effective." (Tr. 87, ll. 16-18)

During this period Dr. Miller remembered receiving literature from the Merrell Company concerning MER/29.

> "Q. (By Mr. Kelleher) Had you up to this time ever gotten any communication or literature by mail or telegraph or otherwise directly from the company, the Merrell Company, concerning MER/29?
>
> "A. Yes, I had.

"Q. And what can you tell us about it to the best of your recollection?

"A. I don't recall exactly when I received this information, but it was very encouraging, the reports of the use of this MER/29.

"Q. What form was the communication?

"A. I don't recall for sure." (Tr. 86, l. 19-87, l. 5)

Throughout the parade of medical witnesses there was unanimity of opinion on the proposition that no drug was "safe." Dr. Miller acknowledged that "all drugs have potential side effects . . . " (Tr. 160, l. 1) and felt that " . . . any side effect is potentially serious . . . " (Tr. 142, l. 7).

In February of 1960 he had read the following written representation: "It is concluded that MER/29 is an effective drug for lowering serum of cholesterol and *warrants further investigation*" (Tr. 168, ll. 8-11) (emphasis ours).

In July, 1960, more than two months prior to prescribing the new drug for appellee, he read an article given to him by the detail man of appellant which stated, among other things, that, "longer observations in a larger group of patients (nine patients) with more detailed toxicity tests are necessary *to establish fully the use and safety of* MER/29 in coronary artery disease" (Tr. 170, l. 21-171, l. 1) (emphasis ours).

He read information in writing by the company, before he prescribed the drug which stated,

> "The specific site of action of MER/29 is now known to be between desmosterol reported to be the last precursor in the synthesis pattern and cholesterol. Although greater than normal quantities of desmosterol can be qualitatively shown in the liver and blood of animals and the blood of human beings treated with MER/29; reduction of total steroid suggests little accumulation. The significance of the presence of this substance is *unknown* and *speculative.*" (Tr. 182, ll. 20-25, Tr. 183, ll. 1-7) (emphasis ours)

He used his Physicians' Desk Reference several times a day (Tr. 141, l. 2) and, in respect to MER/29, it contained the admonitory words that " . . . *lifetime effects are unknown. Periodic examination of patients on prolonged MER/29 is therefore recommended*" (Tr. 81, ll. 18-21).

Dr. Miller had known appellee a long time (Tr. 107, l. 24), it was important that he know his patient's psychological makeup (Tr. 108, l. 11), he had spent considerable time with him on annual physical examinations in the past (Tr. 109, ll. 8-9), and he knew appellee was a patient who de-emphasized symptoms (Tr. 127, ll. 7-9), and felt that, as a patient, "he really (didn't) complain enough" (Tr. 127, l. 4).

Again,

> "I think that he would have a tendency to not call the physician as early as he otherwise might, and perhaps to even ignore certain symptoms and not discuss them at all unless the doctor, unless I ask him specifically about them." (Tr. 128, ll. 8-22)

The doctor saw appellee two times in 18 months (Tr. 161)!

Even though we must accord to a prevailing party's testimony all favorable inferences, it would seem that where there are *admitted* facts which dictate a necessary *legal* result, that these *admitted* facts may not be swept under the rug.

Peculiarly, within the field of prescription new drugs, where, as here, the alleged representation is a *composite* of oral and written statements, should the trier of fact be permitted to *edit* those statements? Instead, must not the Court in the first instance, on the basis of the entire composite representation, including any conditions, qualifications and recommendations for use, determine whether the evidence at best would *legally* support a finding of either express or implied warranty?

(It might be noted here that the Court below, with all due respect, seemed disinclined to decide *specifically the applicable law*, but instead furnished the jury with an abundance of abstract law and appeared to ask it to determine which parts of that law fit the facts as they found them — whereas usually the specific applicable law is first determined by the Court and the jury simply determines whether the facts by them found fit the law (Tr. 1662, ll. 7-11, 1664, ll. 21-25, 1538, ll. 7-10)).[26]

[26] In *Lynch v. Oregon Lumber Co.* (CA 9th, 1939) 103 F.2d 283, at 287, this court said "this instruction clearly illustrates a lack of separation between law and facts." And see *Decker v. Korth*, 219 F.2d 752.

We earnestly submit that the "composite" representations, allegedly relied upon under Dr. Miller's own testimony, admitted and uncontroverted facts, clearly shows this to be a conditional and qualified representation which as a matter of law prevented the issues of either express or implied warranty from properly being submitted to the jury.

C. Should the Usual Implied Warranty of Fitness for Use Be Applied to Prescription Drugs?

A prescription drug case is quite *sui generis*—far different from the case where a manufacturer concocts an ineffective conglomeration of herbs and passes the product off as an arthritic cure (*Research Laboratories v. U. S.,* 167 F.2d 410 (CA 9 Wash.)), or where a poison is not labeled (*Forney v. Sears,* 153 Wash. 615, 280 Pac. 56), or where use of a cosmetic or drug sold to the general public results in harm (*Esborg v. Bailey Drug Co.,* 61 Wn.2d 347, 378 P.2d 298). Here, the fact that a doctor is prescribing makes a difference. *Marcus v. Specific Pharmaceuticals, Inc.* (1958) 191 Misc. 285, 77 N.Y.S.2d 508, and *Wechsler v. Hoffman-LaRoche, Inc.* (1950) 99 N.Y.S.2d 588. See *Magee v. Wyeth Laboratories, Inc.,* 29 Cal. Rptr. 322 (Cal. App. 1963), and *Love v. Wolf,* 38 Cal. Rptr. 183 (1964).

See comment K to Sec. 402 A, Restatement of Torts (2d). (Also 79 A.L.R.2d 377, *et seq.;* 33 Tenn.L.Rev. 323).

The law of Washington is not established in respect to *prescription* drugs. Prophetic interpretation may be necessary. *Cooper v. American Airlines* (CA 2d, 1945) 149 F.2d 355; *Tavernier v. Weyerhaeuser Co.*, 309 F. 2d 87.

"As long as there is diversity jurisdiction, 'estimates' are necessarily all that federal courts can make in ascertaining what the state court would rule to be the law." Mr. Justice Frankfurter concurring in *Bernhardt v. Polygraphic Co.* (1956) 350 U.S. at 209, 76 S.Ct. at 279, 100 L.ed. at 208.

What are the clues?

In *Gile v. Kennewick Public Hospital*, 48 Wn.2d 774, 296 P.2d 662 (1956) the Washington Court held that a breach of warranty cause of action, in respect to an alleged "sale" of blood to a patient by a hospital, was properly dismissed because, although a specific amount of money was charged the patient, this was an item furnished incidental to the contract of service between the hospital and patient.

Esborg v. Bailey Drug Co., 61 Wn.2d 347, 378 P.2d 298, may be helpful although the product was non-prescription.

Too, it is not likely the Washington Court, which pioneered the doctrine of implied warranty of fitness in food cases, will overlook the fact that the *public health* was the compelling inducement. *Cochran v. McDonald*, 23 Wn.2d 348, 161 P.2d 305 (1945) at p. 354. It is not to

be expected that the Court would overlook the contribution to the public welfare that has been made by the producers of prescription drugs. We respectfully suggest that, when a case involving prescription drugs arises, the Washington Court might well be reluctant to extend implied warranty to this narrow field.

Often Federal Courts, in the absence of more to go on resort to the Restatement of the Law (e.g., *Hodges v. Johnson* (W.D. Va. 1943) 52 F.Supp. 488). See Restatement of Torts (2d) Sec. 402 A (j and k).

In this case the Restatement is not applicable. § 402A provides, among other things:

> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> "(a) The seller is engaged in the business of selling such a product, and
>
> "(b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."

The product, the prescription drug, MER/29, did not reach Mr. Golden, the plaintiff, without substantial change in the condition in which it was sold by the manufacturer, Richardson-Merrell, Inc. The druggist repackaged it, discarding the package insert that had the approval of the Food and Drug Administration. Furthermore, the appellee failed to prove that the drug was defective in any way. Appellant proved the contrary (Tr. 1107-1115)

ARGUMENT ON SPECIFICATION IX

Exhibits 97-104, 108 deal with promotional material of the appellant. Strenuous objection was made to the introduction of these exhibits on the ground that both the prescribing doctor and the detail man had testified and yet these exhibits were not linked up with any conversation that the detail man had with the doctor. There is no evidence whatsoever that the prescribing doctor relied on any of them (Tr. 68-87). The principal elements of express warranty are an affirmation of a fact or promise by the seller and reliance thereon by the buyer. *McDonald Credit Service, Inc., v. Church* (1956) 49 Wn.(2d) 400; 301 P.(2d) 1082; *Jeffery v. Hanson* (1952) 39 Wn.(2d) 855; 239 P.(2d) 346; *Eliason v. Wilker* (1953) 42 Wn.(2d) 473; 256 P.(2d) 298. The introduction of these exhibits only served to confuse the jury with respect to the issue of warranty.

CONCLUSION

It will be noted that appellant has foregone assigning error to excessiveness of the $150,000.00 verdict. The reasons are two-fold. Being as objective as we can, we suspect that this Court might well feel that we are arguing about excessiveness from appellant's standpoint only—not from appellee's, but more importantly, we have foregone said assignment lest it detract in any way from the sincerity of our insistence that plain error herein exists.

Although not claiming error on excessiveness, but, be-

cause an error that may not be prejudicial against the backdrop of one trial may be prejudicial in another, we feel it not amiss to invite the Court's observation of the necessarily present, but nonetheless, repulsion-inciting atmosphere of such a trial with the claimant's understandable emphasis on laboratory animal testing — where the appellant's technicians were deliberately killing animals, some of whom were dogs, in order to determine lethal dosage, and then were cutting them up to inspect the parts. The refinement of language to "termination," dissection" and "autopsy" can hardly be expected to overcome the layman's inherent empathic proclivities when simple ear-pulling of twin beagles has been known to rattle the public's political pulse.

In applying the law to the issues of which review is respectfully asked, we urge a studied notice of the *fundamental* distinction between the sale of a *prescription* drug and other food and drug articles intended for human consumption. In the ordinary sense a consumer cannot buy a prescription drug. True, these are available to men who are highly trained in the health sciences to use, subject to the exercise of their individual judgments, as an adjunct in the treatment of various ailments. In exercising that judgment the doctor knows that he is not making use of a substance that is *safe*.

---

[27]Indeed, the description provided by statute is a drug "because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; . . ."

He knows that *every ethical drug has potential side effects;* that if it did not affect the bodily processes it would be an innocuous and worthless placebo. The very purpose of making their sale generally illegal is because such drugs are not safe.[27] When the patient goes to the pharmacy with a "written order of his doctor" which in effect says, "Please furnish to my patient 30 capsules of MER 29—give him written instructions to take them in this manner—he will pay for them," certainly it is nothing that the patient says that makes a contract of sale. In effect, this is part of the *physician's treatment* of the patient.

When this is understood, it is not at all strange to find proverbially "litigation-reluctant" doctors chameleonically becoming almost advocates of their patient's cause in this type of case.

Courts, of course, are quite aware that the liberalization of the law in the field of products liability was to better the balance between consumer and manufacturer. But the ever-steadying hand of the judiciary well knows that one does not right a listing boat by overloading the other side. The *carte blanche* enjoyed by appellee below did not accord with justice.

Courts well know the ease with which one may point a finger and shout, "You should have known!" But does not pointing it so quickly appear unbecomingly captious of those members of a profession which has so recently borne the cross of having blinded so many

thousands of our country's pre-mature babies? And this done quite *innocently,* under *approved* therapy, where the *"toxic"* substance was *just plain oxygen.*[28]

The query is posed: Is it fair that the full responsibility be borne by the manufacturer for the harm that results from a "medically sought after" bio-chemical process within the human body? In the instant case no one has ever contended that there was a single thing unwholesome or adulterated about MER/29—indeed, this "was just what the doctor ordered." Appellant responded to a demand for an unadulterated drug that would lower cholesterol. Richardson-Merrell developed just that—it worked. Unfortunately, the artificial reduction of cholesterol in certain patients is harmful.

The foregoing considerations have been made, and this Court's attention invited to them at the risk of being accused of "jury argument," only because we earnestly feel that "products liability" law as applied to *prescription* drugs still sails an unchartered sea—and certainly some policy observations are proper.

It is a matter of common knowledge that the amendment of mortality tables upward, the conquering of formerly fatal diseases, the enjoyment of vastly better health by the general public has in no small part been by the contributions to medicine of new drugs—by just

[28]This reference to "retro-lental fibroplasia" is *dehors* the record, but was a matter of public news; *e.g.* See *N.Y. Times,* May 2, 1954, Sec. IV, p. 9, col. 5; Sept. 23, 1954, page 41, col. 7; Sept. 26, 1954, Sec. IV, p. 9, col. 6.

such manufacturers as appellant. Dread diseases yet hold out their dare. They will be conquered. Health is perhaps the most fundamental ingredient in public welfare. Efforts that have been so magnificently ameliorative in the past should not be unnecessarily hampered in the future—nor should the average citizen be penalized by increased drug prices because of an unwarranted liberalization of the law respecting this type of manufacture. We must guard against "cutting off our nose to spite our face." We suggest that the syllogistic argument that, because the law has properly seen fit to clear of legal obstacles the path to the door of those who manufacture articles for personal human consumption —and, because a prescription drug is an article for human consumption, an equally clear path should be opened—bears the closest scrutiny.

The *purpose and origin* of legal principles should be ever borne in mind.

We are reminded of what the Washington State Supreme Court, a pioneer in the extension of manufacturer's liability, said in *Cochran v. McDonald*, 23 Wn. 2d 348, 161 P.2d 305 (1945) at p. 354:

> "When our food cases are critically examined, it will be found that the rules pronounced in them are exceptions to the general rule of the law of sales. The position taken was justified on the ground that, when such an article as food for human consumption is considered, a question of *health* is involved, and *public policy and the ends of social justice demand a rule be applied that will aid in the protection of health.*"

Can the public health best be aided (where prescription drugs are involved) by anything less than a *strict* and *careful* application of the law of proximate cause, of fraud and of warranty? We most earnestly urge such application. In so doing we are, of course, respectfully asking only for justice.

Respectfully submitted,

George H. Bovingdon
Attorney for Appellant.

Orvin H. Messegee.
Of Counsel.

CERTIFICATE OF SERVICE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opniion, the foregoing brief is in full compliance with those rules.

George H. Bovingdon

Sherwood E. Silliman
Attorney for Appellant.

Appendices

APPENDIX A

§ 355. New drugs—Necessity of effective application

(a) No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an application filed pursuant to subsection (b) of this section is effective with respect to such drug.

Filing application; contents

(b) Any person may file with the Secretary an application with respect to any drug subject to the provisions of subsection (a) of this section. Such person shall submit to the Secretary as a part of the application (1) full reports of investigations which have been made to show whether or not such drug is safe for use; (2) a full list of the articles used as components of such drug; (3) a full statement of the composition of such drug; (4) a full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug; (5) such samples of such drug and of the articles used as components thereof as the Secretary may require; and (6) specimens of the labeling proposed to be used for such drug.

Effective date of application

(c) An application provided for in subsection (b) of this section shall become effective on the sixtieth day after the filing thereof unless prior to such day the Secretary by notice to the applicant in writing postpones the effective date of the application to such time (not more than one hundred and eighty days after the filing

thereof) as the Secretary deems necessary to enable him to study and investigate the application.

Grounds for refusing application to become effective

(d) If the Secretary finds, after due notice to the applicant and giving him an opportunity for a hearing, that (1) the investigations, reports of which are required to be submitted to the Secretary pursuant to subsection (b) of this section, do not include adequate tests by all methods reasonably applicable to show whether or not such drug is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof; (2) the results of such tests show that such drug is unsafe for use under such conditions or do not show that such drug is safe for use under such conditions; (3) the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug are inadequate to preserve its identity, strength, quality, and purity; or (4) upon the basis of the information submitted to him as part of the application, or upon the basis of any other information before him with respect to such drug, he has insufficient information to determine whether such drug is safe for use under such conditions, he shall, prior to the effective date of the application, issue an order refusing to permit the application to become effective.

Suspension of effectiveness of application

(e) The effectiveness of an application with respect to any drug shall, after due notice and opportunity for

hearing to the applicant, by order of the Secretary be suspended if the Secretary finds (1) that clinical experience, tests by new methods, or tests by methods not deemed reasonably applicable when such application became effective show that such drug is unsafe for use under the conditions of use upon the basis of which the application became effective, or (2) that the application contains any untrue statement of a material fact. The order shall state the findings upon which it is based.

Revocation of order refusing effectiveness

(f) An order refusing to permit an application with respect to any drug to become effective shall be revoked whenever the Secretary finds that the facts so require.

Service of orders

(g) Orders of the Secretary issued under this section shall be served (1) in person by any officer or employee of the Department designated by the Secretary or (2) by mailing the order by registered mail or by certified mail addressed to the applicant or respondent at his last-known address in the records of the Secretary.

Appeal from order

(h) An appeal may be taken by the applicant from an order of the Secretary refusing to permit the application to become effective, or suspending the effectiveness of the application. Such appeal shall be taken by filing in the district court of the United States within any district wherein such applicant resides or has his

principal place of business, or in the United States District Court for the District of Columbia, within sixty days after the entry of such order, a written petition praying that the order of the Secretary be set aside. A copy of such petition shall be forthwith served upon the Secretary, or upon any officer designated by him for that purpose, and thereupon the Secretary shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm or set aside such order. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary or unless there were reasonable grounds for failure so to do. The finding of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive. If any person shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence to be taken before the Secretary and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts by reason of the additional evidence so taken, and he shall file with the court such modified findings which, if supported by substantial evidence.

shall be conclusive, and his recommendations, if any, for the setting aside of the original order. The judgment and decree of the court affirming or setting aside any such order of the Secretary shall be final, subject to review as provided in sections 225, 346, and 347 of Title 28, as amended, and in section 7, as amended, of the Act entitled "An Act to establish a Court of Appeals for the District of Columbia," approved February 9, 1893. The commencement of proceedings under this subsection shall not, unless specifically ordered by the court to the contrary, operate as a stay of the Secretary's order.

Exemption of drugs for research

(i) The Secretary shall promulgate regulations for exempting from the operation of this section drugs intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety of drugs. June 25, 1938, c. 675, § 505, 52 Stat. 1052; 1940 Reorg. Plan No. IV, § 12, eff. June 30, 1940, 5 F.R. 2422, 54 Stat. 1237; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631; June 11, 1960, Pub. L. 86-507, § 1(18), 74 Stat. 201.

INDEX

WITNESSES

INDEX

WITNESSES—Continued

APPENDIX B

EXHIBITS

Plaintiff's

Exhibit Number	*Marked*	*Admitted*
1	58	58
2, 2a, 2b, 2c	71	71
3	77	79
4	78	79
5	84	84
6	92	93
7	97	102
8	98	102
9	113	114
10	113	116
11	114	117
12	120	121
13	132	148
14	149	150
15	149	150
16	200	202
17	210	211
18	237	355
19	247	975
20	259	261
21	272	273
22	272	276
23	297	299
24	320	321
25	330	330

Plaintiff's—Continued

Exhibit Number	*Marked*	*Admitted*
26	347	Rejected
27	367	368
28	367	368
29	369	371
30	369	371
31	370	371
32	370	371
33	370	371
34	370	371
35	370	371
36	381	381
37	388	388
38	392	Rejected
39	399	399
40	401	402
41	418	420
42	432	432
43	433	433
44	433	434
45	434	434
46	434	896
47	434	435
48	434	436
49	434	897
50	434	902
50a	434	898
51	434	585

Plaintiff's—Continued

Exhibit Number	*Marked*	*Admitted*
52	434	903
53	434	585
54	434	906
55	434	586
56	434	Rejected
57	434	911
58	434	911
59	536	544
60	551	551
61	552	552
62	556	558
63	556	558
64	558	560
65	578	579
66	653	654
67	654	976
68	664	666
69	664	666
70	721	722
71	726	726
72	729	Rejected
73	775	779
74	779	793
75	779	794
76	787	788
77	787	788
78	787	788

Plaintiff's—Continued

Exhibit Number	*Marked*	*Admitted*
79	787	788
80	787	980
81	787	
82	787	982
83	787	982
84	787	Rejected
85	787	"
86	787	"
87	787	"
88	787	787
89	787	Rejected
90	787	"
91	787	788
92	787	788
93	787	788
94	787	788
95	800	800
96	Withdrawn	
97	933	936
98	940	951
99	940	951
100	945	946
101	952	953
102	953	956
103	957	958
104	959	960
105	961	961
106	962	963

Plaintiff's—Continued

Exhibit Number	*Marked*	*Admitted*
107	965	965
108	967	968
109	1152	1159
110	1203	1212
111	1264	
112	1319	
113	1522	1541
114	1525	1541
115	1529	1541
116	1530	1541

EXHIBITS

Defendant's

Exhibit Number	*Marked*	*Admitted*
A-1	143	1229
A-2	Withdrawn	
A-3	1043	Rejected
A-4	1050	1191
A-5	1050	1191
A-6	1052	1053
A-7	1054	1054
A-8	1080	1091
A-9	1085	1092
A-10	1085	1092
A-11	1121	1448
A-12	1285	1314
A-13	1372	1373
A-14	1387	1387

NO. 21115

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAYETANO JOHN REYES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN K. VAN de KAMP,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

NO. 21115

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAYETANO JOHN REYES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN K. VAN de KAMP,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 21115

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAYETANO JOHN REYES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT AND STATEMENT OF THE CASE

The appellant, Cayetano John Reyes, was indicted on January 5, 1966, by the Federal Grand Jury for the Southern District of California, Central Division. 1/

This indictment, which consisted of one count, charged appellant with the robbery of a national bank by force, violence, and intimidation, in violation of Section 2113(a) of Title 18, United States Code [C. T. 2].

Appellant was arraigned and entered a plea of not guilty as

1/ C. T. 2; "C. T." refers to Clerk's Transcript of Proceedings.

charged in the indictment, on January 17, 1966 [C. T. 3].

Trial to a jury commenced on February 7, 1966, with the Honorable Roger D. Foley, United States District Judge, presiding [C. T. 20]. On February 8, 1966, the jury returned a verdict of guilty as charged in the indictment [C. T. 19, 21].

On April 1, 1966, Judge Foley sentenced appellant to imprisonment for a period of ten years [C. T. 22].

Notice of appeal was filed on April 11, 1966 [C. T. 23-24], and permission to proceed in forma pauperis was granted on April 25, 1966 [C. T. 25].

The District Court had jurisdiction of the cause under Title 28, United States Code, Sections 3231 and 3237.

This Court has jurisdiction under Sections 1291 and 1294, Title 28, United States Code.

II

STATEMENT OF FACTS

On June 11, 1965, the Bank of America, Wabash-Sentinel Branch, in Los Angeles, California, a national bank and a member bank of the Federal Reserve System whose deposits were insured by the Federal Deposit Insurance Corporation, was robbed by a man who claimed to be carrying a gun and a gas bomb [R. T. 20-28, 102].2/ This bandit plundered the bank of $2,155.00 [R. T. 32].

2/ "R. T." refers to Reporter's Stenographic Transcript.

In making his escape, however, the robber left the holdup note with his victim teller, Miss Carmen Sicre, and at the trial both the handwriting and fingerprints on the note were identified as belonging to appellant, Cayetano John Reyes [R. T. 56, 74].

In the month prior to the robbery, an acquaintance of appellant, one Gilbert Sandoval, had a conversation with the appellant during which one Mario DeSantiago was present, wherein appellant Reyes told Sandoval that Reyes needed money, and asked Sandoval to "pull" a bank robbery with him [R. T. 77-78].

A subsequent conversation took place in the first or second week of June, again at Sandoval's apartment, and during which Mario DeSantiago was again present, along with appellant Cayetano Reyes and his younger brother, Fernando Reyes. At this time appellant Reyes told Sandoval that the appellant "wanted to go pull a robbery" on Atlantic Blvd. in East Los Angeles [R. T. 79].

Appellant returned later that day and told Sandoval that he had decided to rob the bank on Wabash instead of the one in East Los Angeles [R. T. 81]. Appellant held some withdrawal slips upon which he proposed to write "a threatening note" [R. T. 81]. After writing a note which was approved by his brother Fernando, and by Mario DeSantiago, appellant showed the note to Sandoval [R. T. 81]. This was the note which was subsequently used in the bank robbery [R. T. 81-82].

Appellant, together with Fernando Reyes and Mario DeSantiago, left Sandoval's apartment about 2:30 P. M. [R. T. 82] and sometime between 3:00 and 3:30 that afternoon, Sandoval drove

past the Bank of America on Wabash, where he saw a scurry of police cars and police officers rushing to the bank [R. T. 83].

That evening, appellant denied to Sandoval that he robbed the bank [R. T. 84]. However, Sandoval had a subsequent conversation with appellant wherein appellant admitted that he had indeed committed the looting, and he proceeded to give Sandoval $75 of a $150 debt which appellant previously owed Sandoval [R. T. 85-86].

At the trial, the defense called appellant's wife, Barbara Mae Reyes, as its first witness. Mrs. Reyes testified that her husband had been using narcotics heavily up until the time of his arrest [R. T. 120-121, 124-125]. Appellant supported her and the children by selling narcotics [R. T. 129], up until the month of June when, "all of a sudden we weren't getting any more money from what he was selling, and I do know he didn't have any money at that time because we were borrowing from his Mom" [R. T. 127].

Sometime on the afternoon of June 11, the appellant gave his wife a fifty-five dollar ring set [R. T. 129, 139].

III

ARGUMENT

THE HOLDUP NOTE, THE PHOTOGRAPH OF THE HOLDUP NOTE, AND THE ENLARGEMENT MADE OF THE PRINTING ON THE HOLDUP NOTE, WERE ALL PROPERLY RECEIVED INTO EVIDENCE.

A. THERE WERE SUFFICIENT FACTS TO ESTABLISH A PRIMA FACIE SHOWING OF THE HOLDUP NOTE'S IDENTITY, WITHOUT PRODUCING EVERYONE IN THE CHAIN OF CUSTODY.

Government's Exhibit No. 1 was a Bank of America withdrawal slip from the Wabash and Sentinel Branch, upon which the following words were hand printed: "This is a hold up act natural . . . Have a gas bomb and gun . . . Don't make me use it."

The bandit left this note with the victim teller, Carmen Sicre, who turned it over to the manager, Mr. Frank L. Russoe [R. T. 25-26, 31]. Manager Russoe gave the note to Sgt. Lloyd G. Neal of the Los Angeles Police Department [R. T. 33], who retained it until booking the note into evidence on June 11, 1965, at the Central Division Property Section [R. T. 35].

Mr. James Watson, Senior Photographer for the City of Los Angeles assigned to the Criminalistic Section of the Los Angeles Police Department, received the note from a Sgt. Massaro of the latent fingerprint section, and photographed it in its natural state [R. T. 42], before turning it over for chemical analysis to bring

out the fingerprints [R. T. 43].

This photograph of the original note became Government's Exhibit No. 1-A, and was identified by both the victim teller and the photographer as being the photograph of the original holdup note [R. T. 24, 43].

An enlargement of the hand-printing found on the holdup note [Government's Exhibit No. 1] was made from the photograph of the holdup note [Government's Exhibit No. 1-A], and this enlargement was received into evidence as Exhibit No. 6 [R. T. 74].

Appellant contends that because "Sergeant Massaro was never called as a witness by the government in this case to testify regarding his handling, possession, custody, and processing" of the holdup note, neither the holdup note, the photograph of the holdup note, nor the enlargement of the printing on the holdup note [Government's Exhibits Nos. 1, 1-A, and 6] should have been received into evidence.

Continuous custody is certainly not the exclusive way that identity can be proved. In the case of fungible goods, for example, heroin, it may be an effective means of showing that the evidence used at trial is the same substance that was connected with the offense. But where the evidence is as unique and identifiable as a hand-printed holdup note, continuous custody would hardly be required.

As Wigmore says, in 2 Evidence (3rd Ed.) Section 411:

> "Where a certain circumstance, feature, or mark, may commonly be found associated with a large

number of objects, the presence of that feature or mark in two supposed objects is little indication of their identity because, on the general principle of Relevancy (ante §31), the other conceivable hypotheses are so numerous, i.e., the objects that possess that mark are numerous and therefore any two of them possessing it may well be different. But where the objects possessing the mark are only one or a few, and the mark is found in two supposed instances, the chances of the two being different are 'nil' or are comparatively small." [Emphasis added.]

Before a physical object connected with the commission of a crime may properly be admitted in evidence there must be a showing that it is the same object which was so involved in the crime. This determination is to be made by the trial judge. Factors to be considered in making this determination include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. The trial judge's determination that the showing as to identification is sufficient to warrant reception of an article into evidence may not be overturned except for a clear abuse of discretion. Gallego v. United States, 276 F.2d 914, 917 (9 Cir. 1960).

Once the trial judge is satisfied that a prima facie showing has been made, the evidence may be admitted, even though every

custodian has not been produced, and the ultimate issue of identification is then left to the jury. Burris v. American Chickle Co., 120 F. 2d 218 (2 Cir. 1941).

Therefore, the issue in this case is whether there were sufficient facts to establish a prima facie connection and identity between these exhibits and the holdup note used in the bank robbery, without the testimony of Sgt. Massaro.

In this case there exists a plethora of uncontradicted facts concerning the identity of the holdup note. The victim teller, the Bank Manager, and Police Sergeant Neal, all identified Mr. Watson's photograph of the holdup note, Exhibit No. 1-A [R. T. 43], as being a photograph of the holdup note used in the robbery [R. T. 24, 31, 35]. Gilbert Sandoval testified that Exhibit 1-A was a photograph of the note he had watched appellant write and had heard appellant say he was going to use in his robbery of the Wabash-Sentinel Branch of the Bank of America, on the same afternoon, a robbery which appellant later admitted perpetrating [R. T. 81-82, 85]; and there was no indication that the note was ever out of Police custody. Sergeant Neal testified that the note was signed into Property Division and "from that time on Property Division assumes complete control of the evidence." [R. T. 35-36].

It is submitted, therefore, that the trial court was presented with sufficient facts to establish a prima facie connection and identity between these exhibits and the holdup note used in the bank robbery, without the further testimony of one of the policemen who had had possession of the note, Sergeant Massaro. Burris v.

American Chickle Co., supra.

B. THE RECORD DISCLOSES NO HEARSAY TESTIMONY OF SERGEANT MASSARO.

Appellant also contends that "by the denial of the right of confrontation with Sergeant Massaro and the admission of this evidence, Exhibits #1 and #1-A, the court allowed inadmissible hearsay testimony." [Appellant's Opening Brief, p. 20]. Nowhere does appellant's brief set out any hearsay testimony of Sergeant Massaro which allegedly was erroneously admitted, nor, indeed, does appellee's search of the record disclose the existence of any such testimony.

Appellant states that "that portion of the evidence, namely the latent fingerprints obtained by chemical reaction performed by Sergeant Massaro amounted to admission of hearsay evidence and is inadmissible as stated above." [Appellant's Opening Brief, p. 21].

There was no evidence in the trial court that Sergeant Massaro performed any chemical tests. The only mention of Sergeant Massaro was that the photographer, Mr. Watson, received the holdup note from Massaro in its natural state [R. T. 42], and after photographing it, gave it "to some other member of the staff there in the laboratory for chemical treatment to bring out the fingerprints." [R. T. 43]. Mr. Watson further testified that the chemical treatment was performed to Watson's own knowledge [R. T. 43]. There was never any testimony that Sergeant Massaro conducted

any chemical tests.

Additionally, it should be noted, nowhere does the record disclose any request by appellant for a subpoena to issue that would bring Sergeant Massaro to court. There never was a request for a continuance, by appellant, so that Sergeant Massaro's testimony could be elicited. Nor is there any indication that, had appellant requested the presence of Sergeant Massaro, the request would have been denied.

IV

CONCLUSION

A review of the record indicates no error prejudicial to the rights of appellant and, accordingly, the judgment below should be affirmed.

Respectfully submitted,

JOHN K. VAN de KAMP,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.

WILLIAM J. GARGARO, JR.
Assistant U. S. Attorney

APPENDIX

TABLE OF DISPUTED EXHIBITS

EXHIBIT NO. 1: Original holdup note.

EXHIBIT NO. 1-A: Photograph of original holdup note.

EXHIBIT NO. 6: Enlargement of handprinting on original holdup note.

	IDENTIFIED	OFFERED	RECEIVED
Ex. No. 1:	R.T. 23-25 35, 42-44	R.T. 64	R.T. 67
Ex. No. 1-A:	R.T. 23-25, 31, 35, 42-43, 61-62	R.T. 64	R.T. 67
Ex. No. 6:	R.T. 63-64, 70	R.T. 74	R.T. 74

No. 21,119 See Vol. 3371

In the

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

SADIE KATZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF AMICUS CURIAE ON BEHALF OF CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF APPELLANT, SADIE KATZ

Clarence E. Musto
Franklin C. Latcham
Richard S. Kinyon
Morrison, Foerster, Holloway,
Clinton & Clark
Eleventh Floor
120 Montgomery Street
San Francisco, California 94104

Attorneys for ~~Appellant~~ Amicus Curiae

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Codes

Texts

Codes

Texts

No. 21,119

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SADIE KATZ, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	)

BRIEF OF AMICUS CURIAE ON BEHALF OF CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF APPELLANT, SADIE KATZ

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT:

This brief is filed by California Bankers Association as amicus curiae, by their attorneys, Morrison, Foerster, Holloway, Clinton & Clark, in support of appellant Sadie Katz, pursuant to written consent of both the appellant and the appellee, filed herewith.

INTEREST OF CALIFORNIA BANKERS ASSOCIATION

California Bankers Association is a trade organization composed of all 193 banks and trust companies in the State of California. Members of the association are actively engaged in serving as trustees under inter vivos trusts created with community property by California residents for the benefit of themselves and their families. Revocable inter vivos trusts are becoming increasingly popular in estate planning, both because of the continuity of management provided during and after the settlors' lifetimes and because the necessity of probate may be reduced or eliminated.

Normally, where a trust is established with community property, the settlors (the husband acting for his wife and himself as manager and controller of the community, or the husband and wife acting together) have no intention of changing the nature of their property from community to something else during the period in which the trust is revocable, although they may well intend to change their respective rights in the community when the trust becomes irrevocable upon the death of one of the spouses, or in some other manner. California Bankers Association as amicus curiae submits that this represents the general intention of the vast majority of California settlors of revocable inter vivos trusts created with community property.

Because of the large number of inter vivos, community property trusts now being administered by member banks in California Bankers Association and the advantages not only to the banks but to the public at large to be obtained from the creation and continued administration of such trusts, the holding of the district court in this case invokes great cause for concern. To construe a document such as the Katz Declaration of Trust (the Katz trust) in a manner that is so adverse to the normal desires and expectancies of the trustors of such a trust, is both patently unwarranted and patently a source of confusion in the taxation of community property interests.

STATEMENT OF THE CASE

The parties agreed, for purposes of defendant's motion for summary judgment, and the lower court found that the real and personal property placed in the Katz trust was "new" or post-1927 community property. See Finding No. 10 and Conclusion No. 5 (Record pp. 238-40). The trust was established by "LEROY JOSEPH KATZ, a married man," with the written approval of his wife, Sadie Katz. Although the trust instrument named Leroy Katz as the Trustor, the instrument is equivocal in that Article III on page one refers to both Leroy and Sadie as trustors (Record p. 63). "During the lifetime and competency of the Trustor, the Trustee" (Title Insurance and Trust Company) was to "have no rights, duties, or powers with respect to any property held under this Trust, it being

understood that the Trustor retains all such rights, and shall collect, receive, and disburse, without accounting to the Trustee or any other person, all income of every nature and description from the real and personal property held hereunder." Section Four, page 2, of the trust instrument (Record p. 64). Furthermore, the Trustor reserved the right "to revoke, terminate or amend" the trust at any time. Section Thirteen, page 7 of the trust instrument (Record p. 69).

Upon the death of the Trustor, management of the trust was to vest in Sadie Katz during her lifetime and competency, and she was to receive at least 80% of the income for her lifetime and additional amounts of the corpus if necessary for her reasonable support or in the event of her accident, illness, or other misfortune. The remainder of the trust estate was to be held for the benefit of and eventually distributed to Leroy and Sadie's issue. Sections Five through Twelve, pages 3-6 of the trust instrument and Amendments One and Three (Record pp. 79-86).

Prior to Leroy Katz' death the trust was amended on two different occasions. Both amendments were approved in writing by Sadie Katz under a heading entitled "Consent of Trustor's Wife to Partial Amendment" (Record pp. 83 and 86). Other than the two amendments

mentioned above, the trust remained unchanged and was in force on the date of Leroy Katz' death.

ISSUE

The issue presented by this case is whether, by virtue of the execution of the trust agreement, the entire property transferred to the trust became the separate property of Leroy Katz and is thus includable in full in his taxable estate, or whether the trust was a community asset until the time of Leroy Katz' death, so that only one half of the value of the trust property is includable in his gross estate.

ARGUMENT

I. The Issue in This Case Has Already Been Decided by This Court in Favor of the Taxpayer.

In the case of United States v. Stewart, 270 F.2d 894, rehearing denied per curiam (9th Cir. 1959), this court was faced with the precise issue that is involved in the present case, although in the context of annuity and insurance policies rather than a revocable inter vivos trust. The underlying principles with regard to all three types of property are identical. Accordingly, this court must overrule the District Court in the present case or repudiate its Stewart decision.

In Stewart the husband and wife were longtime California residents. The wife died in 1951 and the

mentioned above, the trust remained unchanged and was in force on the date of Leroy Katz' death.

ISSUE

The issue presented by this case is whether, by virtue of the execution of the trust agreement, the entire property transferred to the trust became the separate property of Leroy Katz and is thus includable in full in his taxable estate, or whether the trust was a community asset until the time of Leroy Katz' death, so that only one half of the value of the trust property is includable in his gross estate.

ARGUMENT

I. The Issue in This Case Has Already Been Decided by This Court in Favor of the Taxpayer.

In the case of United States v. Stewart, 270 F.2d 894, rehearing denied per curiam (9th Cir. 1959), this court was faced with the precise issue that is involved in the present case, although in the context of annuity and insurance policies rather than a revocable inter vivos trust. The underlying principles with regard to all three types of property are identical. Accordingly, this court must overrule the District Court in the present case or repudiate its Stewart decision.

In Stewart the husband and wife were longtime California residents. The wife died in 1951 and the

husband survived her. At the time of the wife's death, there were in force 26 annuity and life insurance policies taken out by the husband on his life and paid for with community property funds. In determining whether one half of the cash value of these policies was properly includable in the wife's gross estate, this court had to answer three questions: (1) Were the policies community property under California law at the time of the wife's death? (2) If so, what was the nature and extent of her interests in these policies under California law? (3) Was the value of her interests includable in her gross estate? It is manifest that in Katz this court must answer these same three questions with regard to the trust, but their answers will be, because the husband died first, the converse of those in the Stewart case.[1/]

1/ The analogous relationship between the two situations is shown even more clearly in Commissioner v. The Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958), cert. denied, 359 U.S. 913 (1959), a case involving the taxation of insurance and inter vivos trusts established by the husband where he died first. The Chase Manhattan case is discussed later in this brief. It should also be noted that the courts in both Stewart and Chase Manhattan properly distinguished between rights in the policy itself and rights in the proceeds of the policy, which is analogous to the distinction between the rights of the settlors under an inter vivos trust while it is subject to revocation and amendment, and the rights of the beneficiaries after the trust has become irrevocable and no longer subject to amendment.

A. The Annuity and Insurance Policies Involved in the Stewart Case Were Held To Be Community Property.

This court held that "Under California law, where policies are taken upon the husband's life during coverture and premiums are paid from community funds, the policies are community property. * * * We find nothing in California law which indicates that life policies as items of community property are treated by rules other than or different from those pertaining to community property generally." 270 F.2d at 897-98. This court found this to be true even though these policies were taken out in the husband's name and he alone possessed all the incidents of ownership.

B. Mrs. Stewart Shared a "Present, Existing and Equal" Interest With Her Husband in the Policies.

This court pointed out that

> * * * The respective interests of the husband and wife in community property "are present, existing and equal interests * * *." Cal. Civ. Code § 161(a). The husband retains possession and control of the community property. Cal. Civ. Code § 172. "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the

> testamentary disposition of the decedent and, in the absence thereof, goes to the surviving spouse * * *." Cal. Prob. Code § 201.

270 F.2d at 898.

C. <u>One Half of the Cash Surrender Value of All The Annuity and Insurance Policies Were Included in Mrs. Stewart's Gross Estate</u>.

This court held that "since all premiums were paid with community funds," all the policies were community property

> * * * unless the wife subsequently released her interest, converting it into separate property of the husband. The determination of the question of taxability depends upon whether the wife so released her interest. Whether the wife released her interest depends not alone upon whether she consented to the designation of beneficiaries, but also upon the incidents of ownership retained by the insured in the respective policies.

<u>Ibid</u>.

With regard to the husband's right to cancel the policy, this court stated that "if the husband took the cash surrender value before the wife's death, it would

remain community property in which she had a one-half interest"; and quoting with approval from California Trust Co. v. Riddell, 136 F. Supp. 7, 9 (S.D. Cal. 1955), this court determined that "The fact that the policies in question were retained by the husband and that he had a right to change beneficiaries at will does not mean he could deprive the wife of her community interest therein without her consent." 270 F.2d at 898-99.

1. The Annuity Policies.

This court found that one half of the value of all six annuity policies, which fell into three broad categories, was includable in the wife's gross estate for the reasons set forth below.

First Category - one policy. Four annuity policies had matured at the time of the wife's death and pursuant to the settlement agreements the value of each policy was to be paid in a fixed number of equal monthly installments, first to the husband, then the wife, and then to others. As to one of these annuity contracts, the wife had consented to the settlement agreement that was in effect at her death. This court viewed the wife's consent as follows:

> In effect the joinder of the husband and wife in this settlement agreement constituted a transfer by the community under

which the community retained for its life, or the life of the survivor, the right to income from the property. In our opinion, this policy is includable under [the predecessor of Section 2036(a)(1) of the Internal Revenue Code of 1954] * * *.

In any event, the wife's endorsement did not in our opinion constitute a surrender of her interest in the policy. Such a holding would mean that the payments coming to the husband under this contract would be his separate property rather than community property. We cannot presume that the wife so intended. Nor does the Ettlinger case[2/] compel a contrary conclusion. It is one thing to hold that a wife's consent to a beneficiary designation on an insurance policy on the husband's life means that she gave up her interest in the proceeds of the policy after

---

2/ In Ettlinger v. Connecticut Gen. Life Ins. Co., 175 F.2d 870 (9th Cir. 1949), this court held that under California law a wife surrendered her community property interests in the proceeds of a policy on her husband's life by endorsing her consent to the designation of a beneficiary other than herself.

> her husband's death. It is quite another thing to say that the husband and wife are making a gift of their community interests in an annuity contract when they join in a settlement agreement which has the effect of insuring that the community, or the survivor thereof, will receive the annuity payments as long as either is alive.

270 F.2d at 902.

Second Category - three policies. With respect to the other three matured annuity policies, the wife had consented to earlier settlement agreements, but they were revoked by the husband prior to her death and replaced by settlement agreements to which she did not consent. This court noted that "These transactions illustrate how illusory the wife's interest in the policies would be if it were held that by consenting to a revocable designation of beneficiaries, she surrendered her interest in the community property." Accordingly, this court held that the wife's one-half interest in these three policies was includable in her gross estate. Id. at 901.

Third Category - two policies. With respect to the two unmatured annuity policies, that were not endorsed by the wife, the husband had relinquished the right to obtain the value in cash. However, he retained the right to change

beneficiaries and the right to alter the mode of settlement by electing to have the policy mature at an earlier date. This court held that the policies remained a valuable asset of the community and one half of their value was includable in the wife's gross estate. Ibid.

2. The Insurance Policies.

This court also held that one half of the value of all twenty life insurance policies, which were divided into two general categories, was includable in the wife's gross estate.

First Category. On thirteen of these insurance policies that he took out on his life, the husband retained the right to change beneficiaries, but the wife had endorsed the designation of beneficiaries or mode of settlement. This court pointed out that although such an endorsement might result in a surrender by the wife of her community interest in proceeds after the death of her husband,[3/]

> Here we are concerned with the rights in the policies themselves during the existence of the community. It is important to recognize this distinction in determining what rights were retained by the wife in

---

3/ See Note 1, supra, p.6

the community assets. * * * [Citation to Commissioner v. The Chase Manhattan Bank, supra, note 1.] Under California law the husband has the management and control over insurance policies on his life, although he cannot give them away without the written consent of his wife. Cal. Civ. Code § 172. In the event that the husband dies before the wife, she has the right to object to the proceeds of the policies going to a third person to the extent of her one-half interest therein. * * *

* * * It may well be true that had the husband predeceased the wife in the instant case, her consent to the designation of the beneficiaries would have precluded her from contesting such designation after the death of her husband, but such a rule should not be extended to the present situation. Where the husband retains both the right to obtain the cash value and the right to change beneficiaries, the wife cannot be held to have intended by her endorsement to surrender her community interest in the policies.

> * * * [T]he wife's endorsement of the designation of beneficiaries was at most an assent to an incompleted gift, which was still incompleted at the time of her death. It was not a transfer to her husband. We hold therefore that the wife's interest in these 13 policies is includable in the wife's gross estate for tax purposes.

Id. at 900-01.

Second Category. In the remaining seven life insurance policies, the husband retained the right to change the beneficiaries and to obtain the cash value, and the wife had not consented to the beneficiary designation. The wife's community one-half interest in these seven policies was held to be clearly includable in the wife's gross estate.

In concluding its discussion in respect to both the annuity and life insurance policies, this court held that the wife shared with her husband "present, existing and equal interests" at the time of her death, "that these interests amounted to ownership of one-half of whatever value the policies had at the time of her death, and that such an amount must be includable in her gross estate." Id. at 902. "This is a logical result, since it is clear that upon the death of a husband, with a wife surviving,

only one-half of the proceeds of his life insurance, purchased with community funds, is includable in his estate. [Citing Lang v. Commissioner, 304 U.S. 264 (1938)]." 270 F.2d at 902, n.15.

II. The Fifth Circuit's Decision in Commissioner v. The Chase Manhattan Bank Also Requires a Decision in Favor of the Taxpayer in Katz.

The Court of Appeals for the Fifth Circuit, in Commissioner v. The Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958), cert. denied, 359 U.S. 913 (1959), was faced with the question of "the gift tax effects of trusts and insurance in a community property state where the wife has a present, vested ownership of half the marital community in her own right." 259 F.2d at 234. The issues decided in this case are determinative of the issues in the Katz case because, as the Supreme Court determined in Estate of Sanford v. Commissioner, 308 U.S. 39, 44 (1939), "The gift tax was supplementary to the estate tax. The two are in pari materia and must be construed together." The Supreme Court reaffirmed this holding in Merrill v. Fahs, 324 U.S. 308, 311 (1945).

In Chase Manhattan the husband and wife were residents of Texas, a community property state, during their entire married life. In 1928 the husband created

two inter vivos trusts. One trust, the "insurance" trust, consisted of insurance policies on the husband's life, the premiums on which he paid with community funds. He reserved the right to modify or revoke the trust, and retained the right to change the beneficiaries of the policies. Upon the husband's death the insurance proceeds were payable to the trustee. Income was payable to the wife for life, with the remainder to the settlor's descendants. The other trust, the "living" trust, consisted of securities belonging to the community. Income was payable to the husband for life, then to the wife for life, with the remainder to the settlor's descendants. He reserved the right to modify or revoke the trust. The husband died in 1948.

The court pointed out that under Texas community property law, as in California, the husband acts as the managing agent or trustee of the community and can unilaterally sell community personal property. Unlike under California community property law, however, the Texas husband can also give away community property in its entirety without his wife's consent as long as it is not in fraud of her rights. See 259 F.2d at 239. Thus the unilateral, nonfraudulent designation by a Texas husband, of a third party beneficiary under a

"community" insurance policy or inter vivos trust has the same effect as a similar designation by a California husband with his wife's consent or approval.

A. The "Insurance" Trust.

The Commissioner contended that on the husband's death, the wife made a taxable gift of one half of the value of the proceeds of the insurance policies less the value of the life estate in that half. The taxpayer argued that although the husband could revoke the trust and change beneficiaries during his lifetime, the wife could not, and thus, as to her the trust was complete and irrevocable in 1928 when it was created.

The Fifth Circuit also recognized the difference between rights in the policy itself and rights in the proceeds of such policy, and after distinguishing these rights the court pointed out

> * * * that when Daniel took out the insurance and created the insurance trust, he acted and could act only as manager of the community. The right of revocation was not in Daniel individually, nor was the trust irrevocable only as to Marie's half of the community. Daniel held the power of revocation as agent

> or manager of the community. When he died without having exercised that power, the insurance became payable and the trust became irrevocable. His death operated to effect a taxable transfer from the community (husband and wife) * * *.

Id. at 246-47.

> Up to the time of his death, Daniel, as managing agent of the community had the right to change beneficiaries. When he died without exercising this right, the transfer to the trustee was a completed gift from the community: one-half therefore should have fallen in the taxable estate of the deceased husband. The other half is a taxable gift from the surviving spouse.

Id. at 255.

B. The "Living" Trust.

The court noted that there was

> * * * no showing that the income from the * * * living trust was handled any differently from Daniel's earnings and other income * * *.
>
> It must be borne in mind that Daniel did not create the trust. The community created it. Any rights that were reserved in the settlor

were rights held by the community. * * * Daniel's control * * * could be exercised only as agent for the community.

Id. at 258. [Emphasis supplied by the court.]

In conclusion the court held:

> Since Daniel retained the power of revocation (for the community), there was no taxable gift until the shift in beneficial enjoyment at his death. * * * When Daniel died the trust became irrevocable. His community one-half should have been included in his gross estate under [the predecessors of sections 2036 and 2038 of the Internal Revenue Code of 1954], * * * and Marie made a taxable gift of the other half * * *.
>
> Had Daniel been acting for himself instead of for the community, and had the right of revocation been retained by him individually the taxpayer would have been on stronger ground to urge that, as to Marie, the gift was complete in 1928. But it was as agent for the community, that Daniel held the right of revocation. For tax purposes the gift was incomplete until the right of

revocation ceased on Daniel's death.

Id. at 260-61.

III. The Board of Tax Appeals Has Decided a California Case, Very Similar to Katz, in Favor of the Taxpayer.

Bank of America Nat'l Trust & Sav. Ass'n, Ex'r (Estate of McGowan), 43 B.T.A. 695, acq., 1941-2 Cum. Bull. 2, nonacq., 1941-2 Cum. Bull. 15, appeal dismissed, 123 F.2d 64 (9th Cir. 1941), involved the estate tax consequences of a revocable inter vivos trust, created in part with post-1927 community property, in which the relevant facts were very similar to those in Katz. In 1929 the husband executed a trust instrument and conveyed two parcels of land to the trustees, one of which was his separate property. The other parcel had been purchased with the wife's separate property and a note, secured by a mortgage, which was eventually paid off with what the board treated as post-1927 community property. The husband reserved to himself the income for life, then the income was to go to the wife for life with the remainder to his issue. "He reserved the right to change or amend any of the trust provisions, to revoke the trust in whole or in part * * *, and to withdraw 'any part or all of the trust estate.'" The

trust was to become irrevocable upon the settlor's death. "By an attached declaration his wife waived any 'community or other interests' which she might have in the real property transferred to the trust." 43 B.T.A. at 696-97. The trust property was leased by the husband personally in 1929, 1931 and 1932. At the end of each lease, the wife signed the statement: "I * * * hereby consent to and join in the making of said lease * * *." Id. at 697. In 1931 the husband and wife executed an agreement whereby all their property was to be considered community property.

The husband died in 1937, survived by his wife and seven children. The executor included only half of the value of the trust property in the decedent's estate. The Commissioner disallowed a community property exemption and included all of the trust property in the gross estate.

The Board of Tax Appeals held that the community property agreement was ineffective with regard to the trust property and therefore the value of the entire parcel that had been the husband's separate property was includable in his gross estate. As to the other parcel, however, the Board determined that 1/9 of the

purchase price had been paid with the wife's separate funds and the other 8/9 with post-1927 community funds. The Board then held that only 4/9 of the value of this parcel was includable in the husband's gross estate. The Board thus rejected the Government's argument that all of the trust property belonged to the husband, but held in effect that not only the community property but the wife's separate property as well retained its initial character and did not become the husband's separate property upon creation of the trust. The Commissioner expressed his nonacquiescence with this part of the Board's holding, but he nevertheless joined in a motion to dismiss the petitions for review by the Ninth Circuit.

IV. Application of the Law to the Facts Clearly Results in Only One Half of the Trust Corpus Being Includable in Leroy Katz' Gross Estate.

Leroy and Sadie Katz obviously intended to, and the above three cases demonstrate that they in fact did, establish with their community property a trust that was a community asset at least until the time of Leroy Katz' death, and thus only one half of the value of the trust property is includable in his gross estate.

A. Leroy and Sadie Katz Did Not Intend to Transmute Their Community Property Into Leroy's Separate Property, and Their Subsequent Actions Clearly Show That They Considered the Trust To Be a Community Asset.

It is submitted that an intention to transmute community property into the separate property of one of the spouses should not be found unless there is either a clear expression of that intent, or unless the advantages to be attained by such a transmutation clearly indicate the existence of such an intent. The basic safeguards built into the California community property system, especially for the wife's benefit, should be preserved unless a contrary intention is clearly evident.

The trust instrument itself made no specific mention that the property therein or the income therefrom was to be Leroy's separate property, and Sadie's written approval of the Declaration of Trust (Record p. 72) gives no indication that she intended to give Leroy her community interest in the property transferred to the trust. Furthermore, as shown hereafter, the deposition of Sadie Katz, taken November 17, 1965, clearly indicates that there was never any intention to convert the community property to the husband's separate property

by conveying it to the trust.

It is inconceivable that Leroy and Sadie Katz could have intended to convert the property from community to Leroy's separate, since there appears to be no possible advantage to doing so and at least the following disadvantages. First, there could have been no reasonable tax planning motive for such a transmutation in the light of all of the facts in this case. Leroy had not only been sick long before the trust was created (Deposition p. 14), but he was two and one-half years older than Sadie. Accordingly, the chances clearly were that Sadie would outlive Leroy, and in fact a primary purpose in creating the trust was to provide for Sadie and their children after Leroy's death (Deposition p. 14). Thus, if a transmutation had been effected, the trust corpus available for the benefit of Sadie and the children after Leroy's death would have been depleted unnecessarily by an immediate gift tax at the time the trust was established as well as a greatly increased estate tax at Leroy's death. A second and more drastic disadvantage, at least to Sadie, of such a transmutation would be that Sadie, by giving up her community property rights, would have been left at Leroy's mercy, since the trust income would have been his separate property

and he could have amended or revoked the trust and effectively deprived her of any interest in the trust corpus whatsoever. It cannot be presumed that any wife would actually intend to give her husband such rights and powers.

The fact that Sadie's written consent was included on both amendments to the Declaration of Trust (Record pp. 83, 86) conclusively shows that Leroy, Sadie and the Trustee, all considered the trust to be community property. If they thought or intended that the trust property belonged to Leroy as his separate property, there would have been no need for Sadie's consent. Patently, the inclusion of her consent was inconsistent with such an intent and was actually an overt admission that the trust corpus was in fact not Leroy's separate property. As will be discussed in detail below, her consent was intended to have the same limited effect as the wife's consent to the change of beneficiary on a community insurance policy, i.e., to preclude her from contesting the validity of the amendments after the death of her husband.

B. The Terms of the Trust and the Manner of Its Creation Indicate That the Community Property Was Not Transmuted Into Leroy's Separate Property Upon Its Conveyance Into the Trust.

1. The Trust Remained a Community Asset of Leroy and Sadie Katz, Just As an Annuity or Insurance Policy Purchased With Community Funds Remains a Community Asset.

There is no reason why a revocable inter vivos trust established by the husband with community property should not be treated, for estate and gift tax purposes, the same as an annuity or insurance policy taken out by the husband on his own life and paid for with community funds. The analogy between the two would seem to be complete. Thus, the trust (or the rights thereto), like an annuity or insurance policy (or the rights thereto), is a community asset. Using language previously quoted from the Chase Manhattan case, when Leroy "created the * * * trust, he acted and could act only as manager of the community." Leroy "did not create the trust. The community created it. Any rights that were reserved in the settlor were rights held by the community." Leroy's "control * * * could be exercised only as agent for the community." 259 F.2d at 246, 258.

The fact that the income from the trust property was to be collected, received and disbursed by Leroy "without accounting to the trustee or any other person," and the fact that he reserved the right to revoke,

terminate or amend the trust, are not inconsistent with the conclusion that the trust was a community asset until Leroy's death. Under California law the community property is "under the management and control of the husband." Cal. Civ. Code § 161a.[4/] With regard to community personal property, he has management and control "with like absolute power of disposition, other than testamentary, as he has of his separate estate," although he cannot give it away or dispose of certain items without the written consent of the wife. Cal. Civ. Code § 172.[5/]

4/ Cal. Civ. Code § 161a provides:

> The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code [quoted infra]. This section shall be construed as defining the respective interests and rights of husband and wife in the community property.

5/ Cal. Civ. Code § 172 provides:

> Except as provided in section 172b [relating to the procedure for disposition of community property where one or both spouses are incompetent], the husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

His management and control of community real property is limited, but only to the extent that the wife must join with him in leasing such property for more than one year, or selling, conveying, or encumbering it. Cal. Civ. Code § 172a.[6/] Thus, the fact that Leroy Katz had "like absolute power of disposition" over the trust income is not at all inconsistent with a husband's normal statutory powers over community personal property. There was no showing that Leroy treated the trust income as his separate property, or any differently from the way he had treated the income from the property before the trust was created. Thus, Leroy should be considered to have received and held the trust income as community property, just as the annuity payments received by the husband in the Stewart case were treated as community property.

No California cases have been found that compel the husband to account to his wife for management of

---

6/ Cal. Civ. Code § 172a provides:

Except as provided in Section 172b, the husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered * * *.

community property during the continuance of the marriage. In fact the California Supreme Court has held that the husband's power of management and control of the community property is not terminated because he is also guardian of his incompetent wife, and continues "without the approval of or the requirement that he account to the court having jurisdiction of the guardianship matter." Schecter v. Superior Court, 49 Cal. 2d 3, 314 P.2d 10, 11 (1957). Apparently, it is only where the continuance of the marriage is threatened, such as in a divorce proceeding, or where the continuance of the marital community is threatened, such as when the parties are negotiating a property settlement agreement, that the husband must account to the wife for the community property. See, e.g., Flores v. Arroyo, 56 Cal. 2d 492, 364 P.2d 263 (1961); Vai v. Bank of America, 56 Cal. 2d 329, 364 P.2d 247 (1961); Jorgensen v. Jorgensen, 32 Cal. 2d 13, 193 P.2d 728 (1948).

Leroy's powers to revoke, terminate or amend the trust were not held by him individually but as agent or manager of the community, and the trust was not irrevocable as to Sadie's half of the community. An analogous conclusion was reached by this court and the Fifth Circuit in the Stewart and Chase Manhattan

cases, supra, with regard to the annuity and insurance policies and inter vivos trusts involved therein; thus a similar result in this case is supported by both reason and authority. Therefore, if Leroy had revoked the trust, he would have again held the property in his own name as agent or manager for the community, just as the cash received upon surrender of insurance policies is community property. And if he had amended the trust without Sadie's consent, the amendment would have been voidable by Sadie as to her community interest therein upon Leroy's death, just as the wife can claim her community half of insurance proceeds passing to a third party beneficiary not approved of by her. New York Life Ins. Co. v. Bank of Italy, 60 Cal. App. 602, 214 Pac. 61 (1923). The fact that Leroy retained these powers himself does not mean that he could have deprived Sadie of her community interest in the trust without her consent. To hold otherwise would mean that Leroy could have deprived Sadie of any interest in the property both before and after his death simply by amending the trust or revoking it and disposing of the property in such a manner as to defeat entirely her statutory interest therein. Such a result was not only clearly unintended by the husband and wife, but contrary to public

policy in that the basic safeguards built into California community property law to protect the interests of the wife could have been defeated inadvertently.

In a divorce or other proceeding in which Sadie's rights to the trust property might have been raised, it seems highly unlikely that any court would hold that she had no community property interest in the trust property. It has long been the law in California that when a husband gains an advantage in a transaction with his wife (which would surely have been true under the lower court's holding), there is a presumption of undue influence which will allow her to void the transaction. To overcome this presumption, the husband must show either that he made full and fair disclosure of "all that she should know for her benefit and protection," or that he dealt with her at arm's length and that she had independent counsel. Estate of Cover, 188 Cal. 133, 204 Pac. 583 (1922). There is no indication whatsoever in Sadie's deposition that she had any idea that she was giving up irrevocably her community interest in the trust property; and it is quite clear that she did not deal with Leroy at arm's length and

did not have independent counsel (Deposition pp. 12,14-15). Thus, under state law Sadie could have asserted a community interest in the trust if Leroy had dealt with the property as his own to Sadie's detriment. In the Stewart case this court recognized the long standing rule that the federal taxation of the husband and wife's interests in community property depends upon state law. 270 F.2d at 897. See also Greenwood v. Commissioner, 134 F.2d 915, 918 (9th Cir. 1943) (holding that the value of the gross estate for federal estate tax purposes is determined by looking to state law).

2. The Legal Effect of Sadie's Approval of the Trust and Consent to Its Amendments Is Identical to the Effect of the Wife's Approval of the Beneficiary Designations in Annuity and Insurance Policies.

Whether the wife releases her interest in an inter vivos trust, established by the husband with community property, by approving of its terms, depends upon the rights and powers retained by the husband in the trust, just as this court in Stewart determined that "whether the wife released her interest [in community life insurance policies purchased by the husband on

his life] depends not alone upon whether she consented to the designation of beneficiaries, but also upon the incidents of ownership retained by the insured in the respective policies." As pointed out above, where the husband has retained the right to the income for his life and the power to revoke, terminate, or amend, the wife has a community interest therein, subject to her testamentary power of disposition, just as a wife's interest in community annuity or life insurance policies passes by will or intestacy. It may well be true that by approving of the trust and consenting to the amendments thereto, Sadie was bound by the terms of the amended trust when it became irrevocable on Leroy's death, to the same limited extent as the wife in the Ettlinger case surrendered her community property interest in proceeds of an insurance policy on her husband's life by endorsing her consent to the designation of a beneficiary other than herself. The distinction between the wife's rights in a community trust before and after the husband's death is analogous to the distinction recognized by this court in Stewart between the rights in a community insurance policy and the rights to the proceeds. Where the husband retains any rights and powers in the trust, the wife cannot be held to have intended by her endorsement to surrender her community

interest in those rights and powers. Using language previously quoted from this court's Stewart opinion, her endorsement "was at most an assent to an incompleted gift * * *. It was not a transfer to her husband." 270 F.2d at 901.

A further distinction can be drawn between the rights and powers retained in the trust, and the rights and powers with respect to the property transferred into the trust, i.e., the trust corpus. By approving of the trust, Sadie may have parted revocably with her community interest in the real and personal property transferred to the trustee, in exchange for her community interest in the rights and powers in the trust held by Leroy as agent for the community. Thus the rights and powers retained by Leroy in the trust were community assets; the trust corpus as such was not community property. It belonged to the trustee (legally) and beneficiaries (equitably), subject to divestment or change by the community.[7/]

7/ The reservation of a power of revocation does not prevent the creation of a trust in the lifetime of the settlor, and the beneficiary at once acquires a future interest, although it is an interest subject to be divested by the exercise of the power. The death of the settlor is not a condition precedent to the vesting of the interest in the beneficiary.

1 Scott, Trusts § 57.1 at 447 (2d ed. 1956).

This distinction apparently is what the court meant in Kirkwood v. Bank of America, 43 Cal. 2d 333, 273 P.2d 532 (1954), an inheritance tax case dealing with a revocable inter vivos trust created by the husband with pre-1927 community property, where it said,

> * * * The husband was the transferor with the wife's consent. * * * At the time of the transfer she had the power of restraint * * * but instead of exercising it by withholding her signature * * *, she with the advice of counsel, signed a formal consent to "all of the terms and conditions" of the "Trust Agreement." She thereby parted voluntarily with her expectant statutory rights in the community property as they existed before the transfer, and she succeeded to a new and different interest in the property subject to the trust upon giving her consent to the inter vivos disposition breaking up the community status of the property transferred.

Id. at 339-40, 273 P.2d at 535.

In any event Kirkwood is not actually in point since there:

(a) the trust had been established with pre-1927 community property, in which the wife had only an expectancy and not present ownership in her one half of the property; and

(b) the court was applying an inheritance or succession tax, whereas the federal estate tax is a transfer tax. See Lowndes & Kramer, Estate and Gift Taxes 2-3 (1962).

C. Estate and Gift Tax Consequences of the Katz Trust Pursuant to the Above Analysis.

At the time the trust was created in 1956, there was an incomplete (revocable) transfer to the trust beneficiaries by both Leroy and Sadie, and thus there was no completed gift by either of them from which a gift tax could result. This is because their community real and personal property was simply exchanged for the community rights and powers relating to the trust, including the power of revocation, and thus nothing was irrevocably given up.

On Leroy's death in 1960 only half of the value of the trust property is properly includable in

his gross estate. Under either section 2036(a)[8/] or 2038(a)(1)[9/] of the Code only one half of the

---

8/ Section 2036(a) of the Internal Revenue Code of 1954 provides:

(a) General Rule. -- The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death --

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

9/ Section 2038(a)(1) of the Internal Revenue Code of 1954 provides:

(a) In General. -- The value of the gross estate shall include the value of all property --

(1) Transfers on or Before June 22, 1936 -- To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power

property could be included because he "transferred" only his community half of the property. The other half was transferred by Sadie. Although Leroy could revoke, terminate or amend the trust, only half of the trust property can be included in his gross estate under section 2041(a)(2),[10/] since unilaterally he could thereby

---

(Continued)

> (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation or decedent's death.

10/ Section 2041(a)(2) of the Internal Revenue Code of 1954 provides:

> (a) In General. -- The value of the gross estate shall include the value of all property --
>
> * * * *
>
> (2) Powers Created After October 21, 1942. -- To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942, * * *.

Section 2041(b)(1) provides:

> (b) Definitions. -- For purposes of subsection (a) --

"appoint" only his half of the community to himself, his estate, or the creditors of either. The other half would still belong to Sadie and could be recovered by her. His rights over the trust property were certainly no greater than if he had held the property in his own name as agent or manager for the community, and this was recognized by Leroy and Sadie when her consents were required for amendments of the trust. Since only his community half of the property would have been included in his estate in the latter case, no more than half should be included in his estate because the property was in a revocable trust. This is consistent with the result in Lang v. Commissioner, 304 U.S. 264 (1938), where it was held that upon the death of a husband, with a wife surviving, only one half of the proceeds of insurance on his life, purchased with community funds, is includable in his estate.

(Continued)

> (1) General Power of Appointment. -- The term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate * * *.

It seems clear that Sadie made a taxable transfer of her half of the trust property but not until Leroy's death. See the Chase Manhattan case, supra. By consenting to the trust and subsequent amendments, Sadie surrendered her community property interest in the "proceeds" of the trust as amended, to the extent of the other beneficiaries' interests therein. This transfer was incomplete until Leroy's death, since he, as agent and manager of the community, could have revoked the trust and returned the trust property to the community. On his death the trust became irrevocable, completing the transfer, and thus Sadie would appear to have become liable for a gift tax based on the difference, if any, between the value of her community half of the trust that she gave up and the value of her interest under the terms of the trust.

This same half of the trust property will also be includable in Sadie's gross estate on her later death under section 2036(a)(1), since she consented to a transfer of her half of the community property into the trust and retained for her life "the possession or enjoyment of, or the right to the income from, the property."

If Sadie had predeceased Leroy, one half

of the value of the trust would have been includable in her gross estate under section 2033,[11/] since the trust was a community asset, in which she would have had a community interest at her death. This follows upon authority of the Stewart case where one half of the value of the community annuity and insurance policies were includable in the wife's gross estate where she predeceased her husband.

CONCLUSION

There is no element of tax avoidance involved in this case. Under the theory of the taxpayer and the amicus curiae, half of the trust property is taxable to the husband on his death, and the other half will be taxed to the wife on her later death. In addition, the wife is liable for a gift tax as a result of the trust's becoming irrevocable at the husband's death. This is at least as much tax liability as if there had been no inter vivos trust, and the property had been put into a similar testamentary trust under the husband's will. Taxpayers in community property states should not be

---

11/ Section 2033 of the Internal Revenue Code of 1954 provides: "The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death."

overtaxed because they chose to establish an orderly method of managing and passing on their community property before their deaths and to avoid the bother and expense of probate proceedings.

The district court's unrealistic opinion in this case has created a tax trap and threatens to disrupt the intention of the trustors of many trusts presently in existence. If the district court's analysis is correct, a great many existing trustors may already be retroactively trapped. Thus, if the lower court's decision is upheld, it necessarily follows that Sadie made a taxable gift to Leroy of her half of the community property passing into the trust at the time it was created, and either Sadie or the trust corpus necessarily would be subjected to an additional and substantial gift tax as well as Leroy's estate tax on the entire trust corpus. Finally, under the Government's theory, there is no guarantee that one half of the trust corpus would not be includable also in Sadie's gross estate under section 2036(a)(1) on her later death, because she consented to a transfer of her half of the community into a trust under which she was a life income beneficiary (after the prior

life estate of her husband).

The Government's position in this case not only lacks reason and authority but it seeks an inequitable result. If the lower court's decision is upheld, Leroy and Sadie Katz and their estates will end up paying considerably more tax than if the property had never been placed in trust. Thus, the Government is attempting to capitalize on a situation that in reality never existed, by reading the language of the trust literally but in vacuo and ignoring the realities of the community property system. We concur heartily with the Fifth Circuit in the Chase Manhattan case where it was said: "The Commissioner [of Internal Revenue] owes a duty to the United States government to litigate zealously in the interest of collecting taxes. But he owes a duty to all taxpayers, including the litigating taxpayer, to see that the tax law is applied justly." 259 F.2d at 237.

It is respectfully submitted that for the reasons given herein and in the brief filed by Appellant Sadie Katz, the judgment of the lower court should be reversed. If this court does not

reverse the lower court, it is manifest that the following undesirable results will pertain:

First, and foremost, the Estate of Leroy Katz will be excessively and unjustly taxed;

Second, numerous other estates will be harassed by revenue agents attempting to apply the Katz case to other community trusts; and

Third, a long series of court actions will be instituted by estates in attempts to obtain an overruling of the Katz case or at least to have its application be so circumscribed as to render it nugatory.

It is incumbent on this court to obviate all three of the above results here and now.

Dated: November 4 , 1966.

Respectfully submitted,

Clarence E. Musto
Clarence E. Musto

Franklin C. Latcham
Franklin C. Latcham

Richard S. Kinyon
Richard S. Kinyon

Morrison, Foerster, Holloway, Clinton & Clark
Morrison, Foerster, Holloway, Clinton & Clark

Attorneys for ~~Appellant~~ Amicus Curiae
~~Sadie Katz~~ California Bankers Associat

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD S. KINYON

Richard S. Kinyon
for
MORRISON, FOERSTER, HOLLOWAY,
CLINTON & CLARK

CERTIFICATE OF SERVICE BY MAIL

RICHARD S. KINYON hereby certifies:

That his business address is 120 Montgomery Street, San Francisco, California 94104; that he is an active member of the State Bar of California and that he is not a party to the cause.

That on the date hereof he served three copies of BRIEF OF AMICUS CURIAE ON BEHALF OF CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF APPELLANT, SADIE KATZ on each of the following, by placing three copies of each of said documents in an envelope, addressed, respectively, as follows:

(1) BURTON S. LEVINSON, ESQ.
Levinson, Marcus & Bratter
8500 Wilshire Blvd., Suite 801
Beverly Hills, California 90211

(2) MITCHELL ROGOVIN, ESQ.
Assistant Attorney General
U.S. Department of Justice
Tax Division
Washington, D.C. 20530

Attention:
RICHARD C. PUGH
Acting Assistant Attorney General

LEE A. JACKSON,
Chief, Appellate Section

(3) UNITED STATES ATTORNEY
c/o Loyal Keir, Chief, Tax Division
600 United States Courthouse
312 North Spring Street
Los Angeles, California 90012

That said envelope was then sealed and postage fully prepaid thereon and on said date was deposited in the United States Mail (Registered) at San Francisco, California.

Dated: November 4, 1966.

RICHARD S. KINYON

Richard S. Kinyon
Attorney

NO. 21125

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD ALLYN McCULLOUGH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division,
MICHAEL HEUER
Assistant U. S. Attorney

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America

NO. 21125

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD ALLYN McCULLOUGH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
MICHAEL HEUER
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America

TOPICAL INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

NO. 21125

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD ALLYN McCULLOUGH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On October 20, 1965, the Federal Grand Jury for the Southern District of California returned an indictment in three counts, naming as defendants the appellant, Donald Allyn McCullough and James Sanford Crist. All of the counts of the indictment were based upon alleged violation of Title 18, United States Code, Section 641. The indictment read as follows:

"COUNT ONE:

On or about June 27, 1965, in Los Angeles County, within the Central Division of the Southern

District of California, defendants JAMES SANFORD CRIST and DONALD ALLYN McCULLOUGH along with Bruce Donald Davis, Benjamin Rosenberg, Joseph Zaffino, and William Henry Robinson, knowingly and wilfully stole and purloined laboratory equipment made of platinum, iridium, tungsten and rhodium, from the premises of the Korad Corporation, 2520 Colorado, Santa Monica, California, property of the United States having a value in excess of $100.00.

"COUNT TWO:

From on or about June 28, 1965 to approximately June 30, 1965, in Los Angeles County, within the Central Division of the Southern District of California, defendants JAMES SANFORD CRIST and DONALD ALLYN McCULLOUGH along with Bruce Donald Davis, Benjamin Rosenberg, Joseph Zaffino and William Henry Robinson received, concealed and retained with intent to convert to their own use and gain laboratory equipment made of platinum, iridium, tungsten and rhodium, stolen from the premises of the Korad Corporation, 2520 Colorado, Santa Monica, California, property of the United States having a value in excess of $100.00, which property theretofore had been stolen and purloined as the defendants then and there well know.

"COUNT THREE:

On or about June 29, 1965, in Los Angeles County, within the Central Division of the Southern District of California, defendants JAMES SANFORD CRIST and DONALD ALLYN McCULLOUGH along with Bruce Donald Davis, Benjamin Rosenberg, Joseph Zaffino, and William Henry Robinson knowingly and wilfully, without authority, sold, conveyed and disposed of laboratory equipment made of platinum, iridium, tungsten and rhodium, stolen from the premises of the Korad Corporation, 2520 Colorado, Santa Monica, California, to Howard Martin, Jr., property of the United States having a value in excess of $100.00."

On November 29, 1965, defendant McCullough entered a plea of not guilty to the three counts of the indictment. Jury trial commenced at Los Angeles on December 13, 1965 and continued to December 17, 1965, when the jury returned a verdict of guilty against defendant McCullough on Counts One, Two and Three of the indictment.

On January 17, 1966, after the court denied defendant McCullough's motions for judgment of acquittal or in the alternative for a new trial, judgment of conviction was entered against him on Counts One, Two and Three of the indictment. At the same time, defendant McCullough was sentenced to a term of two years

imprisonment on each of the three counts, to run concurrently.

Defendant McCullough filed a timely notice of appeal on January 17, 1966.

Jurisdiction of the District Court for the Southern District of California, Central Division, was based on Title 18, United States Code, Sections 641 and 3231.

Jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294(1).

II

STATUTES INVOLVED

Title 18, United States Code, Section 641, provides in pertinent part as follows:

> "Whoever . . . steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any . thing of value of the United States or of any department or agency thereof, . . . or
>
> "Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been . . . stolen, purloined or converted --
>
> "Shall be . . . [guilty of an offense]."

III

QUESTIONS PRESENTED

1. Did the trial court err in failing to direct a verdict of acquittal on the ground that the evidence was insufficient to show that the stolen property was that of the Government and worth in excess of $100.00?

2. May defendant raise for the first time in this Court the issue of whether the question of his guilt on all three counts of the indictment was properly submitted to the jury by the trial court?

3. Did the trial court err in failing to direct a verdict of acquittal on the ground that the only evidence against McCullough was the uncorroborated testimony of his accomplices?

IV

STATEMENT OF FACTS

The night of June 27, 1965, the premises of the Korad Corporation of Santa Monica, California were burglarized. The burglary was discovered at 1:45 a.m. on June 28, 1965, by the co-owner of the West Coast Detective Agency and Police Patrol, Mr. George L. Shishim [R.T. 15 & 20] [1/] Mr. Shishim then discovered that a door on the patio and a glass door located on the

---

1/ "R.T." refers to the Reporter's Transcript herein.

Colorado Avenue side of the Korad building had been broken [R. T. 24].

On the morning of June 28, 1965, Mrs. Marla A. Pearson, a research chemist for Korad Corporation, discovered that a small filing cabinet in a Korad office had been broken into [R. T. 35 & 63]. Mrs. Pearson also noticed that a cabinet in the chemical-physics laboratory, used to store precious metals, had been tampered with. On the afternoon of June 25, 1965, she had placed a number of platinum crucibles in this cabinet with a combination lock [R. T. 37]. Now, on Monday, June 28, the precious metals in this cabinet were found by her to be missing.

In another cabinet in the office there had been on June 25th two new iridium crucibles, which were also found to be missing [R. T. 37-8]. Patchwork had been done on one of these crucibles by one of the workers in the plant. The appearance of iridum crucibles subsequently recovered and introduced at trial was similar to these at Korad Corporation [R. T. 42, 118]. Other crucibles of nickel, zirconium and platinum also placed in evidence at trial were similar in appearance to those found missing in the burglary at Korad Corporation [R. T. 43]. Indeed, the crucibles of precious metal produced at the trial below were substantially proved to be identical to those taken in the burglary [R. T. 42, 43, 44, 45, 175-177]. These were Exhibits One through Ten in evidence at the trial below.

Mr. Donald Kopczick, the administrative assistant to the controller and security officer at Korad, who was also in charge

of the administration of Korad's Government contracts, was called to the Korad Corporation around 2:30 a.m. on June 28, 1988 by Mr. Shishim and informed of the burglary [R.T. 60]. Mr. Kopczick noticed that the two cabinets used to store the precious metals had been tampered with [R.T. 62]. Mr. Kopczick supervised the computation of the loss. The determination of this loss was computed by taking the purchase orders, which showed the value of each inventory item of precious metal and whether it was charged to the Government or to Korad Corporation [R.T. 68, 78], minus the inventory on hand and credits showing which previous metals had been returned for scrap [R.T. 65].

Mr. Kopczick referred in his testimony below to the Government property record cards showing which contract the property pertained to [R.T. 65]. These contracts were admitted into evidence [R.T. 440]. The government contracts had their own special number series [R.T. 69]. By referring to these cards, the Korad Corporation knew which property the Government owned [R.T. 69-70]. This Government property stock record card was designed by the Korad Corporation in connection with its inventory control system [R.T. 68]. This system was approved by the Air Force Property Administrator, Mr. Howard M. Schultheis. Mr. Schultheis visited the Korad Corporation every three months to analyze all procurement and stock records, purchase orders, invoices, etc. [R.T. 449]. The duration of Mr. Schultheis' visits lasted from five to seven days [R.T. 450].

Mr. Schultheis found that the internal accounting procedure

precious metals but in fact did not do so [R. T. 211].

Zaffino had a discussion with Rosenberg about breaking into the Korad plant [R. T. 217]. Rosenberg then drew Zaffino a map of the layout of the Korad plant [R. T. 248].

On the night of the burglary, Zaffino met with Rosenberg. Rosenberg told Zaffino that he was going to burglarize the plant himself [R. T. 273]. Rosenberg said he had an inside man in the Korad plant who had showed him around [R. T. 274, 304]. Rosenberg stated that there was no alarm system at the Korad plant [R. T. 278]. There is also some indication that McCullough told Rosenberg about the files in the Korad plant [R. T. 416].

On the night of the crime, Robinson broke a window and entered the plant [R. T. 258]. Davis was with him. Davis was in communication with Rosenberg and Zaffino, who were outside the plant, by walkie-talkie [R. T. 255]. Robinson stayed in the plant fifteen or twenty minutes after Davis left [R. T. 261]. After the burglary Davis phoned Zaffino and told him that he had the stuff from Korad [R. T. 264].

After the burglary, McCullough called Martin Metals on the telephone and asked Mr. Martin if he wanted to purchase certain metals which belonged to the platinum group [R. T. 101]. McCullough represented that he was from the firm of Parrish and Bond [R. T. 102]. On or about June 28, 1965 McCullough brought some platinum, in fabricated shapes, to Mr. Martin's office [R. T. 108]. This platinum looked as if it had been rolled or spun [R. T. 108]. Mr. Martin purchased these metals from appellant

McCullough for $1,574 [R.T. 110]. The receipt given was for 15.74 troy ounces of platinum [R.T. 109-118]. On the 29th of June, appellant McCullough came to Martin Metals with a man named Rose. They then sold Martin Metals more platinum. They were issued two checks: one for $1,098 (approximately) and one for $1,213.75 [R.T. 113]. Some material was left at Martin Metals to be tested for its contents. Later a check for $2,589.20 was issued for this material which was iridium [R.T. 114]. This material that was sold to Martin Metals by McCullough and Zaffino had certain marks placed on it by Mr. Martin [R.T. 118]. These markings were for testing the metalic contents of the material [R.T. 120]. Mr. Martin later identified these marks on the witness stand [R.T. 118-120].

Later on Zaffino was sent by Rosenberg to Martin Metals to sell some of the loot [R.T. 132]. A check to Zaffino for $560 for 5.6 troy ounces of platinum was issued to Zaffino by Martin [R.T. 134]. Later on July 12, Zaffino picked up 2 checks from Martin for $1,705 and $1,532, respectively [R.T. 134].

The day after the burglary Rosenberg and McCullough showed up at Zaffino's apartment. Then all three went down to the bank and cashed the checks from Martin Metals. They split the proceeds three ways [R.T. 290]. (Davis was to receive 50% and the inside man, McCullough, Zaffino and Rosenberg were to divide up the rest.) [R.T. 326, 328].

Later on Martin Metals issued a check for $2,300. McCullough took this check to the bank and cashed it [R.T. 293].

McCullough told Zaffino, Rosenberg and Davis that he thought the inside man should get more money because the expected $6,000 to $8,000 burglary turned out to be a $57,000 burglary [R.T. 294].

Martin Metals purchased these metals from the defendants from June through July of 1965 [R.T. 436]. These metals were the proceeds of the Korad burglary described above, and were received in evidence at the trial below.

V

ARGUMENT

A. THE COURT DID NOT ERR IN FAILING TO DIRECT A VERDICT OF ACQUITTAL ON THE GROUND THAT THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT THE STOLEN PROPERTY WAS THAT OF THE GOVERNMENT AND WORTH IN EXCESS OF $100.

Appellant's Brief [page 3] points out that Maria A. Pearson's testimony indicated that she was unable to specifically identify Government's Exhibits One through Ten as items which had been on the premises of the Korad Corporation and were taken in the burglary of June 27, 1965 [R.T. 33 et seq.]. However, as noted by the appellant, Mrs. Pearson, among other witnesses, did testify that the exhibits resembled certain items which had been on the premises of the Korad Corporation and taken in the burglary [R.T. 45]. Platinum crucibles were locked in a cabinet in the laboratory by Mrs. Pearson in the afternoon on June 25,

1965. In another cabinet were two new iridium crucibles [R. T. 37-8]. Patchwork had been done on one of these crucibles by one of the workers in the plant. The appearance of the iridium crucibles which were introduced into evidence as the fruits of the burglary [Exhibit 10], was like these at Korad Corporation, even to the patchwork [R. T. 42, 118]. Also other crucibles of nickel zirconium and platinum [Exhibit 4] produced at trial were similar in appearance to those stolen from Korad Corporation [R. T. 43].

According to the testimony of Donald Kopczick [R. T. 65, 67-100], the loss of government property was determined by an internal accounting system. The accounting procedure involved the comparison of purchase orders which indicated the direct charge numbers for governmental contracts involved; these contracts were admitted into evidence [R. T. 452, 491] with inventory cards. There were separate inventory cards for government property. These inventory cards showed the amount of precious metals used in the chemical physics area and to which contract they pertained [R. T. 491]. The inventory cards were then checked against the actual inventory on hand.

The appellant attacks this inventory system stating that there was ". . . great detail (in explaining how the system operated) but (the system) is replete with conclusions of fact without foundational predicate" [at p. 3]. The appellant goes on to state ". . . the conclusions were predicated on the internal inventory record control system of the Korad Corporation and were not based on any other facts offered into evidence" [at p. 4]. It is very

1965. In another cabinet were two new iridium crucibles [R. T. 37-8]. Patchwork had been done on one of these crucibles by one of the workers in the plant. The appearance of the iridium crucibles which were introduced into evidence as the fruits of the burglary [Exhibit 10], was like these at Korad Corporation, even to the patchwork [R. T. 42, 118]. Also other crucibles of nickel zirconium and platinum [Exhibit 4] produced at trial were similar in appearance to those stolen from Korad Corporation [R. T. 43].

According to the testimony of Donald Kopczick [R. T. 65, 67-100], the loss of government property was determined by an internal accounting system. The accounting procedure involved the comparison of purchase orders which indicated the direct charge numbers for governmental contracts involved; these contracts were admitted into evidence [R. T. 452, 491] with inventory cards. There were separate inventory cards for government property. These inventory cards showed the amount of precious metals used in the chemical physics area and to which contract they pertained [R. T. 491]. The inventory cards were then checked against the actual inventory on hand.

The appellant attacks this inventory system stating that there was ". . . great detail (in explaining how the system operated) but (the system) is replete with conclusions of fact without foundational predicate" [at p. 3]. The appellant goes on to state ". . . the conclusions were predicated on the internal inventory record control system of the Korad Corporation and were not based on any other facts offered into evidence" [at p. 4]. It is very

difficult to see how the loss of property could be otherwise computed than by this accounting process. What stronger evidence could be introduced in order to show proof of loss or a theft?

The substance of Dr. Ricardo G. Pastor's testimony was that the exhibits presented to him appeared to be similar to those on the premises of the Korad Corporation but that he could not specifically identify the exhibits [R. T. 174]. Government's Exhibit 1 was an iridium crucible [R. T. 170]; Exhibit 2 was an iridium crucible containing gadolenum, aluminum, and neodymium in small amounts [R. T. 171]. Exhibit 8 consisted of a tungsten crucible. The dimension of this exhibit corresponded to the specifications of a special crucible that was built for Korad by the Allen Jones Electronics Corp. [R. T. 180].

Also Dr. Pastor's testimony indicated that Korad Corporation was the only company then undertaking Governmental efforts in the utilization of the specific material (referring to gadolinium aluminate) which he had analyzed [R. T. 175].

Mr. Howard M. Schultheis testified that the accounting system of the Korad Corporation conformed to the standards set by the Armed Services Procurement Regulations [R. T. 445-6]. He also testified, while looking at the contracts placed in front of him on the witness stand, that these were CPFF (Cost Plus Fixed Fee) contracts between the United States Government and the Korad Corporation [R. T. 477], pursuant to which the stolen metals were furnished to Korad by the Government. The existence of these contracts was shown by evidence [R. T. 452].

Mr. Schultheis indicated that all governmental contracts with the Korad Corporation had a clause which stated that title to " . . . property furnished by the Government shall remain in the Government" [R. T. 448].

Because of the testimony of the witnesses named above and the evidence introduced at the trial, especially the accounting exhibits and the governmental contracts, the appellant's argument is without merit. The jury was properly permitted to infer that the metals stolen from Korad were property of the United States of a value more than $100, and that these metals were introduced in evidence at the trial below after they were recovered from Martin Metals. For, when the appellate courts consider an attack upon the sufficiency of the evidence on appeal, the general rule is that they must view the evidence at trial in the light most favorable to the Government.

> Glasser v. United States, 315 U.S. 60 (1942);
>
> Noto v. United States, 367 U.S. 290 (1961);
>
> Stein v. United States, 327 F.2d 825
>
> (9 Cir. 1964), cert. denied 377 U.S. 970.

B. APPELLANT MAY NOT RAISE FOR THE FIRST TIME IN THIS COURT THE ISSUE OF WHETHER THE QUESTION OF HIS GUILT ON ALL THREE COUNTS OF THE INDICTMENT WAS PROPERLY SUBMITTED TO THE JURY BY THE TRIAL COURT.

At trial the Court instructed the jury without including in its instructions the cautionary instruction that defendant McCullough could not be found guilty both of stealing and of receiving the same Government property [R. T. 511-541]. As a result, defendant McCullough was found guilty by the jury on both Count One and Count Two of the indictment; that is, he was found guilty of stealing and receiving the same Government property [R. T. 544-545].

In the case of Milanovich v. United States, 365 U.S. 551 (1961), the Supreme Court held, in construing Section 651 of Title 18, United States Code, that "the trial judge erred in not charging that the jury could convict of either larceny or receiving, but not of both" (365 U.S. at 555). In Milanovich, defendant's counsel had maintained throughout the trial that a thief cannot be convicted of receiving from himself, and had pressed for a jury instruction to the effect that his client could be convicted of larceny or of receiving, but not both (365 U.S. at 352-353).

In the case at bar, the reverse is true. At no time during the trial did McCullough's counsel raise the issue whether his client should be convicted of stealing and receiving the same precious metal crucibles. Nor was an instruction requested to the effect that McCullough could not be so convicted. McCullough's

B. APPELLANT MAY NOT RAISE FOR THE FIRST TIME IN THIS COURT THE ISSUE OF WHETHER THE QUESTION OF HIS GUILT ON ALL THREE COUNTS OF THE INDICTMENT WAS PROPERLY SUBMITTED TO THE JURY BY THE TRIAL COURT.

At trial the Court instructed the jury without including in its instructions the cautionary instruction that defendant McCullough could not be found guilty both of stealing and of receiving the same Government property [R. T. 511-541]. As a result, defendant McCullough was found guilty by the jury on both Count One and Count Two of the indictment; that is, he was found guilty of stealing and receiving the same Government property [R. T. 544-545].

In the case of Milanovich v. United States, 365 U.S. 551 (1961), the Supreme Court held, in construing Section 651 of Title 18, United States Code, that "the trial judge erred in not charging that the jury could convict of either larceny or receiving, but not of both" (365 U.S. at 555). In Milanovich, defendant's counsel had maintained throughout the trial that a thief cannot be convicted of receiving from himself, and had pressed for a jury instruction to the effect that his client could be convicted of larceny or of receiving, but not both (365 U.S. at 352-353).

In the case at bar, the reverse is true. At no time during the trial did McCullough's counsel raise the issue whether his client should be convicted of stealing and receiving the same precious metal crucibles. Nor was an instruction requested to the effect that McCullough could not be so convicted. McCullough's

counsel pronounced himself satisfied with the instructions as given [R. T. 541]. Thus this issue was never raised at the trial.

This Court of Appeals should not consider on appeal an issue which was never raised at the trial below.

> Morales v. United States, 373 F. 2d 527 (9 Cir. 1967);
>
> Grant v. United States, 291 F. 2d 746 (9 Cir. 1961), cert. denied 368 U. S. 399 (1961).

It is of course true that Rule 52(b) of the Federal Rules of Criminal Procedure permits an appellate court to recognize plain error to which no objection was made in the trial court, in the Court's discretion. This, the Government submits, is a discretion which should not be exercised here in defendant's favor. For defendant received concurrent sentences of two years on each of the three counts of which he was convicted. His sentence was not more severe on account of the multiple findings of guilt which were made by the jury, and appellant was therefore not prejudiced by any error which may have occurred.

C. THE TRIAL COURT DID NOT ERR IN FAILING TO DIRECT A VERDICT OF ACQUITTAL ON THE GROUND THAT THE ONLY EVIDENCE AGAINST McCULLOUGH WAS THE UNCORROBORATED TESTIMONY OF HIS ACCOMPLICES.

Appellant asserts in his brief (at page 7) that his conviction should not be allowed to stand "since it is based on the uncorroborated testimony of accomplices".

It is not true that McCullough's conviction is supported only by accomplice's testimony. On the contrary, witness Howard Martin, an employee of Martin Metals, Inc. and by no stretch of imagination an accomplice of McCullough, gave substantially the following testimony: on June 28 or 29, 1965, after the Korad burglary, McCullough, whom Martin had previously met and from whom he had previously bought precious metals [R. T. 100-104], telephoned Martin and said he had some platinum he wanted to bring over for sale [R. T. 107]. McCullough did come to Martin's place of business, and brought with him some platinum which had been rolled or spun [R. T. 108]. Martin bought this platinum (15.74 troy ounces) from McCullough for $1,574.00 [R. T. 110-111]. On the next morning McCullough returned to Martin's place of business, and brought with him a number of crucibles which he left there for a determination of their metallic content [R. T. 112]. The next afternoon, McCullough returned again, and received a check for $2,589.20 in payment for the crucibles, which were of the platinum group [R. T. 114]. These crucibles were identified by Martin at the

trial as having been purchased by him from McCullough [R. T. 118], and were in evidence as Government's Exhibit 10. Also, Government's Exhibits 4 (silver crucible tops), 5 (tungsten or molybdenum crucible), 6 (more crucibles), 7, 9, 3, and 8 were identified as metal which had been brought to Martin by McCullough or his accomplices after the Korad burglary [R. T. 119-123]. These are the same metals which resembled the ones taken from Korad in the burglary.

Thus it can hardly be said that appellant was convicted on the uncorroborated testimony of his accomplices. Moreover, the jury was admonished by the Court that the testimony of the accomplices Rosenberg and Davis was to be "received with caution and weighed with great care" [R. T. 524]. Even if their testimony had been the only evidence against McCullough, conviction could have been proper if the jury believed them.

> Andett v. United States, 265 F. 2d 837, 846-847 (9 Cir. 1959);
>
> Williams v. United States, 308 F. 2d 664, 666 (9 Cir. 1962);
>
> Williams v. United States, 315 F. 2d 113, 115 (9 Cir. 1962).

CONCLUSION

For the reasons stated above, the judgments of conviction should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

MICHAEL HEUER,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

NO. 21126

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID A. HILL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN K. VAN de KAMP,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

NO. 21126

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID A. HILL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN K. VAN de KAMP,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 21126

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID A. HILL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT AND STATEMENT OF THE CASE

The appellant, David A. Hill, was indicted on February 23, 1966, by the Federal Grand Jury for the Southern District of California, Central Division.

This indictment, which was in One Count, charged that:

> "On or about November 10, 1965, in Los Angeles County, within the Central Division of Southern District of California, defendant DAVID A. HILL and Andrew H. Miller, with intent to defraud the United States, knowingly sold and facilitated the

sale to Agent Charles H. Restow of the Federal Bureau of Narcotics, 1,497.00 grams of marihuana, which said marihuana, as the defendant then and there well knew, theretofore had been imported and brought into the United States contrary to law." 1/

On March 25, 1966, before the Honorable Francis C. Whelan, United States District Judge, jury trial commenced, and appellant, on March 29, 1966, was found guilty as charged in the indictment. 2/ On April 28, 1966, appellant was sentenced to imprisonment for a period of five years [C. T. 24, 25].

Notice of Appeal was filed on May 6, 1966 [C. T. 26].

The District Court had jurisdiction of the case under Title 28, United States Code, Sections 3231 and 3237.

This Court has jurisdiction under Sections 1291 and 1294, Title 28, United States Code.

II

STATUTE INVOLVED

The One-Count Indictment was based upon Title 21, United States Code, Section 176(a), which provides in pertinent part as follows:

1/ C. T. 2, "C. T." refers to Clerk's Transcript of Proceedings.

2/ R. T. 146, 162, "R. T." refers to Reporter's Stenographic Transcript.

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought in to the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . .

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury. . . ."

III

STATEMENT OF FACTS

At about 3:15 P. M. on November 8, 1965, Agent Charles Restow of the Federal Bureau of Narcotics was introduced to the

appellant Hill, in Hermosa Beach, California. He was introduced by an informant, named Dennis Snowdon [R. T. 51-53].

During this meeting, appellant Hill told Agent Restow that "he (Hill) could furnish marihuana in quantities, but that he would have to contact a partner of his who was involved in the business" [R. T. 54]. Hill was asked by Agent Restow when such a sale could take place and Hill answered that they could go over right then [R. T. 54]. Thereupon, Hill alighted from the booth in which they were sitting and stated, "I'm going to call my partner" [R. T. 54].

At approximately 4:00 P. M. on that same November 8th, one Andrew H. Miller arrived and was introduced to Agent Restow by appellant Hill [R. T. 54]. Restow stated that Hill had told him he would be able to purchase some marihuana. Miller answered that "Yes, it could be arranged" [R. T. 55].

Agent Restow then asked Miller what the price would be, whereupon Miller turned to appellant Hill and asked, "What did you tell him?" [R. T. 55]. "I told him $125 a kilo", Hill responded.

Agent Restow then handed $250 of Government funds to Miller, who counted it, and then handed $30 of this money to appellant Hill for his share in the transaction [R. T. 56].

The next time Agent Restow met with appellant Hill and Andrew Miller was at 9:45 in the evening of the same day. This meeting took place at the Zig Zag Cafe, and was prearranged for the delivery of the marihuana [R. T. 56, 58]. However, Miller told Restow that the marihuana could not be delivered until the following morning at which time appellant Hill would be out of

town [R. T. 57]. After this evening meeting on November 8th, Agent Restow had no further contact with appellant Hill [R. T. 58].

On the morning of November 9th, Agent Restow attempted to meet with Andrew Miller, however, Miller was late in arriving, and when he finally came Restow had already left [R. T. 58, 75].

The following day, November 10th, at approximately 11:00 A. M., Andrew Miller telephoned and then met with Agent Restow in Torrance, California, and delivered to him what was introduced at trial as Government's Exhibit One, namely, 1,452 grams of marihuana [R. T. 58-60, 50-51]. This marihuana was "unmanicured", wrapped in foreign packaging, and typical of the marihuana that comes from the interior of Mexico and Baja California, in the expert opinion of Agent Restow [R. T. 114-118].

On cross-examination of Agent Restow at the trial, counsel for the appellant asked Agent Restow how he had come to know the informant, Dennis Snowdon. Agent Restow answered that he had been conducting an investigation with the St. Louis office of the Federal Bureau of Narcotics regarding sales of marihuana in that city and that in so doing he had occasion to interview the informant Snowdon. Agent Restow told Snowdon that the Federal Bureau of Narcotics was interested in the source of supply for the St. Louis case. Snowdon, who was not under indictment and against whom no prosecution was pending, set up a meeting for Agent Restow to make a purchase from appellant Hill. This was the November 8th meeting between the appellant and Agent Restow [R. T. 61-64].

Andrew Miller testified at the trial as a witness for the

United States. He had known appellant Hill for approximately six months and they had enjoyed a business relationship with each other. Miller testified that they were "partners", partners "in the sale of narcotics" [R. T. 72-73]. Miller further testified that it was Hill who had set the price for the sale of marihuana which was the subject of prosecution [R. T. 85].

When asked on cross-examination what he had done in order to obtain the marihuana involved in this case, Andrew Miller answered, "I merely went after it" [R. T. 80].

Of the $250 in Government funds which was paid for Exhibit One, $200 represented payment for the marihuana, $20 was retained by Andrew Miller, and $30 went to appellant Hill [R. T. 75-76].

Appellant Hill did not choose to testify.

IV

ARGUMENT

A. APPELLANT HAD SUFFICIENT "POSSESSION" OF THE MARIHUANA CHARGED TO INVOKE THE STATUTORY PRESUMPTION OF KNOWLEDGE OF ILLEGAL IMPORTATION.

Appellant contends, as basis for his first Specification of Error, that there is no proof of either actual or constructive possession of the marihuana charged such as would allow the Government to rely on the statutory presumption relating to

importation, as found in 21 U.S.C. §176(a).

Appellee certainly concedes that there was no proof of actual possession of the marihuana by appellant Hill. There was, however, a plethora of uncontradicted facts clearly showing that appellant Hill had constructive dominion and control over the marihuana, which he held jointly with his "partner" Andrew Miller.

This Court has, on several occasions held that possession may be constructive and joint, as well as physical or exclusive, and still raise the statutory presumption provided in 21 U.S.C. §176(a), as well as in the analogous narcotics section 21 U.S.C. §174. 3/

In Anthony v. United States, 331 F.2d 687 (9 Cir. 1964), this Court held that constructive possession will support the presumption of 21 U.S.C. §176(a) in a prosecution for selling marihuana. In so ruling, the court cited Cellino v. United States, 276 F.2d 941 (9 Cir. 1960) wherein a similar question was raised. In Cellino the appellant was found to have "facilitated" a sale of heroin by his co-defendant Bruno to a deputy sheriff. The opinion noted, at page 343, that as to appellant Cellino:

> "The primary question on this appeal is whether the United States may rely upon the statutory presumption arising from possession to establish that the heroin was imported contrary to

---

3/ Appellee will rely in this brief on cases interpreting the word "possession" used in both statutes, just as every one of the cases cited in appellant's opening brief involves 21 U.S.C. §174 rather the statute under which appellant was convicted, 21 U.S.C. §176(a).

law and that appellant knew it was so imported. . . .

"It is not disputed that Bruno had possession of the narcotics. Appellant contends however, that there is no evidence that he ever had possession, and that the Government may not rely upon possession in Bruno to prove illegal importation or knowledge thereof as to appellant, since the presumption arises only where 'The defendant is shown to have or have had possession of the narcotic drug."

The court citing Title 18, U.S.C. §2 and inter alia, United States v. Cohen, 124 F.2d 164 (2 Cir. 1941), Bernstein v. United States, 315 U.S. 811, accepted the Government's contention that:

" . . . the possession required by §174 need 'not be that of the person convicted' and upon proof that the appellant 'facilitated' or 'aided and abetted' in the sale, possession in his co-defendant Bruno was then sufficient to make the presumption effective against appellant."

and at page 946 held:

" . . . the circumstantial evidence of dominion and control is sufficient to justify a finding by the jury of constructive possession in appellant within the meaning of Section 174."

In the Cohen case cited by this Court in Cellino, supra, the Second Circuit held at page 165:

"Under the first statute we have quoted [21 U.S.C. §174] it was only necessary to show possession of the narcotics to establish guilt and under the second statute [18 U.S.C. §2], making an abettor a principal, it was not necessary that each of the defendants should have had the narcotics, but only that one or more of them had possession while the others aided in the illicit transaction to which that possession was incidental."

The word "facilitates" as used in Title 21 U.S.C. §174, "in any manner facilitates a sale", has been held by this Court in Pon Wing Quong v. United States, 111 F.2d 751 (9 Cir. 1940), at page 756 to mean:

" . . . the common and ordinary definition as expressed by a standard dictionary. Quoting from Webster's Unabridged Dictionary, 'facilitate' is defined as follows: 'To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task.' "

Cited with approval in Bruno v. United States, 259 F.2d 8 (9 Cir. 1958), cert. den. 333 U.S. 832.

In McClure v. United States, 332 F.2d 19 (9 Cir. 1964), appellant McClure was present in co-defendant Gaxiola's residence at the time Gaxiola physically delivered heroin to one Hopping, an undercover informant of the Federal Bureau of Narcotics, and

received $100 from Hopping therefor. The only other evidence connecting McClure with this transaction was the subsequent dividing of the purchase money by Gaxiola with appellant McClure. On appeal, McClure argued that the presumption of 21 U.S.C. §174 was inapplicable to him "because he was not shown to have had possession of the narcotics involved" in this transaction. This Court stated at page 23:

> "Possession sufficient to raise the presumption can be either actual or 'constructive.' Actual physical contact with the drugs is not required; rather possession consists of 'having [the drugs] in one's control or under one's dominion.' . . . (footnote citation omitted) The power to control can be shared by others, and it can be shown by direct or circumstantial evidence."

This opinion was consistent with the earlier decision in Mullaney v. United States, 82 F.2d 638 (9 Cir. 1936) where although there was no evidence of appellant Ethel Mullaney ever having physical custody of the narcotics involved, or actually participating in the charged sale, nevertheless the circumstances of marked money being found in the bed where she slept with her co-defendant husband, and that she was in such room at the time the undercover informant entered the residence to purchase heroin from her husband, although he did not enter the room, was held sufficient evidence for application of the statutory presumption of 21 U.S.C. 174 and also sufficient evidence to have permitted the case to go to the jury.

See also:

Rodella v. United States, 286 F. 2d 306 (9 Cir. 1960), cert. den. 365 U. S. 889 (1961).

The decision of this Court in Hernandez v. United States, 300 F. 2d 114 (9 Cir. 1962), upon which appellant Hill relies so heavily, is not to the contrary. An extensive review of cases involving possession was there made, and the court stated:

> "The function of 'possession' in the statutory scheme is to shift to the defendant the burden of identifying the legitimate source of the narcotic drugs, if, indeed they were not illegally imported. This statutory rule of evidence . . . (footnote reference omitted) rests upon (1) the rational relationship between 'possession' of narcotic drugs by the defendant and knowledge on his part that a substance which is normally imported and rarely imported legally, . . . (footnote reference omitted) was in fact imported contrary to law, plus, (2) as a corollary, the consideration that the 'possessor' of the narcotic drugs has so much more convenient access to the facts as to their source that it is not unreasonable to require him to come forward with an explanation . . . (Footnote reference omitted.) Clearly, both rational relationship and relative convenience support an interpretation of 'possession' which extends the presumption to all who have dominion and control over particular narcotic drugs."

In finding inadequate basis to conclude "possession" on the part of appellant Hernandez, this Court was faced with a record where the trial judge sitting without a jury had specifically found:

> " . . . that neither illegal importation of the heroin nor personal knowledge by the defendant that the heroin was illegally imported had been proved. The court further found that it had not been proved that the defendant personally had either physical possession of the heroin or power to control it." (Emphasis added.)

It was noted in footnote 14, at page 120:

> "If the trial court had found that defendant shared control over the heroin, the defendant then would have had constructive 'possession' of the heroin and the statutory presumption would have been brought into play under the decisions earlier referred to."

In substance, it was the conclusion of the court that where the principal defendant, found to be a possessor of heroin, is not on trial, because a fugitive, and the appellant is specifically found by the trier of fact not to have had either actual or constructive possession of the heroin involved, then the possession of such other person cannot be imputed to such an appellant. The instant case involves no such determination by the trier of fact of lack of possession.

In the trial of appellant Hill, it was uncontested that he was the "partner" of Andrew Miller, and that Miller was the one who made the actual delivery. Appellant Hill referred to Miller more than once as his "partner" before calling him to obtain the marihuana [R. T. 54]. Miller himself stated that he and Hill were partners in the sale of narcotics [R. T. 73].

Further, it is uncontradicted that appellant Hill, not Miller, set the price for the instant sale of marihuana [R. T. 85].

It is also uncontradicted that appellant Hill received more money for this transaction than did his partner, Miller [R. T. 75-76], and that Miller's only participation was that he, in his words, "merely went after it" [R. T. 80].

If it is true that these facts permit even a possible inference of control over the marihuana, then, in the view of the Ninth Circuit, "the possible inference becomes a proper inference of the fact of possession -- of dominion and control over the marihuana -- and once made by the trier of fact, and determined by him to be substantial, clear and convincing proof, such a determination of fact is binding on (this Court). Williams v. United States, 9 Cir. 1961, 290 F. 2d 451." Anthony v. United States, supra.

B. THE JURY WAS PROPERLY INSTRUCTED THAT THE ACCUSED HAD TO HAVE "POSSESSION" BEFORE THE STATUTORY PRESUMPTION COULD ARISE.

Appellant's second argument seems to be that the court, in its instructions, failed "to exclude from the jury the possibility that appellant might have joint control of the marihuana merely because he either aided Miller or was engaged in a common plan with Miller." (Appellant's Opening Brief p. 17.)

At no time did the trial judge ever instruct the jury that if they found appellant merely to have aided Miller or engaged in a common plan with him the statutory presumption could arise without finding actual or constructive possession on the part of the appellant. On the contrary, the court specifically instructed that the statutory presumption could be raised only if the accused was shown to have had possession of the marihuana. The court stated:

> "To aid enforcement, Section 176(a) of Title 21, United States Code, further provides:
>
> > " 'Whenever on trial for a violation of this subsection the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains his possession to the satisfaction of the jury.'
>
> "However, this statute does not change the

fundamental rule that the accused is presumed innocent until proved guilty beyond a reasonable doubt; nor does it impose upon the accused any burden or duty to produce proof that the narcotic drug was lawfully imported, or any other evidence.

"As previously stated, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged. What the statute means is that upon a trial for a violation thereof, if the jury should find beyond a reasonable doubt that the accused has had possession of the marihuana as charged, the fact of such possession alone, unless explained to the satisfaction of the jury by the evidence in the case, permits the jury to draw the inference and find that the marihuana was imported or brought into the United States of America contrary to law, and to draw the further inference and find that the accused had knowledge that the marihuana was imported or brought in contrary to law. . . .

* * * *

"In connection with any explanation offered for possession of marihuana, you are reminded that in the exercise of constitutional rights the accused need not testify. Possession may be explained to the satisfaction of the jury through other circumstances

and other evidence in the case, independent of the testimony of the accused." [R. T. 153, 154]. (Emphasis added.)

The court also instructed:

"In this case you are concerned only with the guilt or innocence of the defendant David A. Hill.

"Four essential elements are required to be proved in order to establish the offense charged in the indictment. First, that the defendant sold and facilitated the sale of marihuana as alleged -- sold or facilitated the sale of marihuana as alleged; second, that the marihuana had been imported or brought into the United States contrary to law; third, that the defendant knew the same to have been imported or brought into the United States contrary to law; and, fourth, that the defendant did such act knowingly and with intent to defraud the United States." 4/ [R. T. 150].

Thus, the question presented to the jury in the instructions of the court was that of the accused's possession. Furthermore, the trial judge meticulously defined possession so that there could

---

4/ As the trial court said, appellant's proposed instruction No. 3, C. T. 20, states nothing more than the instructions quoted above [R. T. 105].

be no mistake, and then added:

> "If the jury should find beyond a reasonable doubt from the evidence in the case that the accused either alone or jointly with others had actual or constructive possession of the marihuana described in the indictment, then you may find that such was in the possession of the accused within the meaning of the word 'possession' as used in these instructions." (Emphasis added). [R. T. 149].

If, after all this, counsel for the appellant still felt the jury could convict without first finding that the accused had actual or constructive possession of the marihuana, he could have asked for special findings of fact, which he did not see fit to do.

In summary, the instructions, taken as a whole, fully and correctly communicated to the jurors that they had to be convinced, beyond a reasonable doubt, that the accused had possessed the marihuana, either actually or constructively, before the statutory presumption could be invoked. Clearly, the requirements of justice were satisfied.

CONCLUSION

A review of the record indicates no error prejudicial to the rights of appellant and, accordingly, the judgment below should be affirmed.

Respectfully submitted,

JOHN K. VAN de KAMP,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.
WILLIAM J. GARGARO, JR.

NO. 21,129

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AHMAD WAZIRI,

Petitioner,

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

RESPONDENT'S BRIEF

CECIL F. POOLE
United States Attorney

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
Telephone: 556-7633

Attorneys for Respondent

INDEX

AUTHORITIES CITED

NO. 21,129

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AHMAD WAZIRI,

Petitioner,

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

RESPONDENT'S BRIEF

JURISDICTION AND STATEMENT OF THE CASE

The immediate action of respondent upon which the petition filed is based is the order to show cause of February 23, 1966 (R., p. 27). The hearing on this order was held March 9, 1966 (R., p. 20). The decision of the Special Inquiry Officer of March 9, 1966 (R., p. 16) was appealed to the Board of Immigration Appeals. The Board by its decision of July 1, 1966 (R., p. 1) dismissed the appeal, and the administrative action was final. The petition to this Court to review under §106(a) was filed on July 20, 1966.

The specific action of respondent, review of which is sought by petitioner, is the proceeding pursuant to Section 246 (8 USC 1256) to rescind adjustment of status. This proceeding originated by giving notice of intention to rescind (Exhibit 1, R., p. 437), copy of which is Attachment I.

To present the complete picture, respondent sets forth the chronological sequence of the case.

1. October 24, 1959. Petitioner entered the United States at New York for a period of one year, as a nonimmigrant student.

2. October 13, 1960. He married Mary Elizabeth Herzog at Carson City, Nevada.

3. November 3, 1960. She filed a petition to accord him nonquota status (Section 101(a)(27)(A) of the Act, 8 USC 1101(a)(27)(A)).

4. November 23, 1960. The petition was approved.

5. December 19, 1960. He filed application for status as a permanent resident under Section 245 (8 USC 1255).

6. February 1, 1961. Permanent resident status granted.

7. February 7, 1961. He filed a complaint for divorce in San Francisco.

8. March 3, 1961. An interlocutory decree was entered.

9. March 5, 1962. Final decree entered.

10. June 5, 1963. A notice of intention to rescind adjustment of status under Section 246 of the Act was served on petitioner (R., p. 273), (Attachment I).

11. October 17, 1963. Hearing held in rescission proceedings (R., p. 272).

12. April 8, 1964. Decision of the Special Inquiry Officer rescinding status of permanent resident (R., p. 264), copy of which is Attachment II.

13. July 24, 1964. Appeal to the Board of Immigration Appeals was dismissed (R., p. 241), copy of which is Attachment III.

14. October 2, 1964. Respondent issued an order to show cause why petitioner should not be deported. The hearing was noticed for October 28, 1964 and then rescheduled, continued to November 20, 1964.

15. November 19, 1964. Petitioner filed a motion with the Board of Immigration Appeals to reopen the rescission proceeding (R., p. 215) on November 20, 1964. Following the hearing on

the order to show cause, petitioner was allowed voluntary departure by the Special Inquiry Officer.

16. January 15, 1965. The Board of Immigration Appeals granted the motion to reopen, and withdrew the order of July 24, 1964 (R., p. 205).

17. April 2, 1965. Further proceedings before the Special Inquiry Officer on the reopening (R., pp 99-168).

18. June 3, 1965. Decision of the Special Inquiry Officer (R., pp 90-98). No change in his decision of April 8, 1964. Copy is Attachment IV.

19. December 13, 1965. Decision of the Board of Immigration Appeals dismissing appeal (R., pp. 31-34). Copy is Attachment V.

20. January 3, 1966. Petitioner filed a petition to review, No. 20,637.

21. February 18, 1966. By stipulation, the deportation order of November 2, 1964 was vacated by order of this Court, without prejudice to the institution of new deportation proceedings, based upon the rescission order of June 3, 1965.

22. February 23, 1966. Respondent issued an

order to show cause and notice of hearing, directing petitioner to show cause, on March 9, 1966, why he should not be deported pursuant to Section 241(a)(2), (R., p. 27).

23. March 9, 1966. Hearing before the Special Inquiry Officer (R., p. 20) and the decision of the Special Inquiry Officer allowing voluntary departure (R., p. 16).

24. July 11, 1966. Order of the Board of Immigration Appeals dismissing appeal (R., p. 1.)

25. July 20, 1966. Petition for review filed.

Although a proceeding under Section 246 of the Act to rescind adjustment of status may not be immediately related to a final order of deportation, in this case, upon the final determination of rescission, petitioner's stay in the United States was longer than authorized, and he became deportable under Section 241(a)(2), (8 USC 1251(a)(2)), of the Act. The determination made was "during and incident to the administrative proceeding, conducted

"by a Special Inquiry Officer.",

Foti v. INS
375 US 217

Giova v. Rosenberg
379 US 18

and within the ambit of Section 106(a) (8 USC 1105(a)).

However, there is a caveat. Section 246(a) provides:

> "If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken * * * and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made."

The section specifically requires:

> "It shall appear to the satisfaction of the Attorney General".

Section 242(b) of the Act states the requirements with regard to proceedings before a

Special Inquiry Officer. Subdivision 4 provides:

> "(4). No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

The Supreme Court in Woodby v. INS and Sherman v. INS, Nos. 4 and 80, October Term 1966, on December 12, 1966, 385 US 276, has stated the rule that (p. 286):

> "no deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true. (Emphasis supplied.)

It is respondent's position that the measure of the deportation order is the standard of Woodby and Sherman, but the measure of the rescission is the "satisfaction" of the Attorney General.

SPECIFICATION OF ERROR

The specification of error is directed to the decision of the Special Inquiry Officer in the rescission proceedings and Section 246, and charges said decision was not supported by reasonable, substantial and probative evidence on the administrative record considered as a whole.

THE QUESTION PRESENTED

1. What is the standard of proof applicable to the proceedings under Section 246?

2. Has the rescission been determined in accordance with the applicable standard?

STATUTES

§242(b)(4)	8 USC 1252(b)(4)
§245	8 USC 1255
§246	8 USC 1256

Section 101(a)(27)(A), PL-89, 236, October 31, 1965, 79 Stat. 916, substituted "special immigrant" for nonquota immigrant, and deleted "child" and "spouse".

Section 201 was amended by the same Act:

> "(b) The 'immediate relatives' referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States."

ARGUMENT

1. The Applicable Standard Of Proof.

The Court will note that there are two separate proceedings involved in this review. The

first is the proceeding pursuant to Section 246, and the second is the proceeding pursuant to Section 242(b).

A. Section 242(b).

The statute has specifically provided in Section 106(a)(4) and Section 242(b):

> "The petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive."

The Supreme Court in Woodby v. INS and Sherman v. INS, supra, has now determined that the above quoted portion of Sections 106(a)(4) and 242(b)(4) is addressed to the scope of judicial review, and not to the degree of proof required in deportation proceedings, and that the applicable burden of proof, or standard of persuasion, expressed by the Court in the last paragraph of his Opinion, page 286, is as quoted above.

The order to show cause (R., pp 27-29) alleges that petitioner:

"(1) You are not a citizen of national of the United States.
(2) You are a native and citizen of Iran.
(3) You entered the United States at New York about October 29, 1959.
(4) You were admitted for a temporary period as a student until October 23, 1960.
(5) On February 1, 1961 your status was adjusted to that of a permanent resident under the provisions of Section 245 of the Immigration and Nationality Act.
(6) On December 13, 1965, the Board of Immigration Appeals dismissed your appeal from the decision of the Special Inquiry Officer dated June 3, 1965, ordering that no change be made in the decision of April 8, 1964 rescinding the permanent resident status previously granted to you.
(7) You previously informed the Immigration and Naturalization Service that you would not be willing to depart voluntarily.
(8) You have remained in the United States for a longer period than authorized."

The facts as to these charges are supported by evidence that is clear, unequivocal and convincing. Such evidence is also reasonable, substantial and probative.

The attack engendered by the petitioner, therefore, centers on the proceedings conducted under Section 246 of the Act.

B. Section 246

Section 246 is related to the sections of the Act which permit adjustment of status (Sections 244, 245, 249) and looks to withdrawal of suspension in Section 244, and rescission of adjustment under Section 245 or 249, if "it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and canceling deportation in the case of such person, if that occurred, and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made."

Proceedings under Section 246 are thus seen to be separate from Section 242(b), and may or may not lead to Section 242(b). Upon rescission of status adjustment, the alien may be restored to his original status (a student in this case), and

not be immediately vulnerable to deportation. As in this case, deportation proceedings are commenced by the issuance of the order to show cause. The alien might seek review of the rescission of his adjusted status by resort to judicial review, declaratory judgment in the District Court, (28 USC 2201 or 5 USC 1009), prior to the institution of deportation proceedings.

The next question is obvious: "Is there any difference in the standard in the District Court on review of the Section 246 proceeding, as opposed to the standard in this Court on review under Section 106(a), where the entire record as to both proceedings may be reviewed.

Reasonable, substantial and probative evidence, the Supreme Court says in Woodby, is the scope of review. Respondent concedes that the scope of review should be the same in both Courts.

However, the Supreme Court also says that the burden of persuasion as to the facts alleged

as grounds for deportation is by "clear, unequivocal and convincing evidence."

Section 246 states "if it shall appear to the satisfaction of the Attorney General". As to the scope of review of "the satisfaction of the Attorney General", if it is assumed that it must be founded upon "reasonable, substantial and probative evidence", must the applicable standard be "clear, unequivocal and convincing", and is there any measuring rod for determining, if the Attorney General is satisfied by evidence that is reasonable, substantial and probative, that such evidence is not clear, unequivocal and convincing?

It is the view of the respondent that the imposition of standards to be determined by probing the esoteric meaning of the words "reasonable, substantial and probative, clear, unequivocal and convincing" is an absurdity. Whether what is reasonable, substantial and probative may not be clear, unequivocal and convincing, or whether what is clear and convincing may not be reasonable and substantial and probative, etc., etc., respondent will not probe.

Suffice to say, respondent will submit that the Attorney General was satisfied by reasonable, substantial and probative evidence, and that the deportability of petitioner has been established by evidence that is clear, unequivocal and convincing.

C. The Record.

The record contains four administrative decisions, two by the Special Inquiry Officer and two by the Board of Immigration Appeals.

1. The Special Inquiry Officer's Decision, in rescission proceedings under Section 246 (Attachment II).

The decision notes the following:

Petitioner, a native and citizen of Iran, age 38, admitted to the United States as a student for one year at New York on October 24, 1959.

On October 13, 1960 he married Mary Herzog, an American citizen.

On November 3, 1960 she filed a petition to accord him nonquota status; approved November 23, 1960.

On November 19, 1960 he filed a Section 245 application for status as a permanent resident; granted February 1, 1961.

On February 7, 1961 he filed a complaint for divorce in San Francisco, obtained an interlocutory decree on March 3, 1961 and a final decree March 5, 1962.

Proceedings under Section 246 instituted June 5, 1963.

The Special Inquiry Officer made the following comments (p. 268) (Attachment II):

> "The respondent is a trickster and prevaricator. According to the Form I-20 (Certificate of Eligibility for Nonimmigrant "F" Student Status) which he presented when he came to the United States, he was destined to Utah State University * * * * He never entered the university. Although students are not permitted towork without the approval of the Service, a few months after his arrival he obtained employment. When Mary filed the petition to accord him nonquota status he 'certified' that he was a student and was not working. * * * *
>
> "I carefully observed the respondent during the hearing, and I am satisfied that his veracity had not improved. Except where corroborated, I would not believe any of his testimony. (P. 269). * * *

> "The respondent married Mary just before the expiration of the one-year period of his admission. He arranged the situation so he would not have to live with her. He filed his complaint for divorce less than one week after his status here was adjusted. The reasons he gave for the divorce at the trial were completely at variance with those he testified to before me at the hearing. I am satisfied he testified falsely at both proceedings." (PP 270, 271.)

2. The Board of Immigration Appeals dismissed the appeal July 24, 1964 (R., p. 241). (Attachment III.)

3. Petitioner obtained new counsel, and a motion to reopen was filed so that additional evidence could be adduced. The motion was granted.

4. The decision of the Special Inquiry Officer following the reopened hearing (R., p. 90), (Attachment IV), makes the following observation (p. 98):

> "In my decision of April 8, 1964, I found the respondent to be a trickster and prevaricator who had married Mary solely to obtain benefits under the immigration laws. None of the evidence adduced at

"the reopened hearing persuades me that these findings were in error. If ever there was a case of a fraudulent marriage, this is it. No change will be made in my previous order."

5. The decision of the Board of Immigration Appeals on appeal, December 13, 1965 (R., p. 31) (Attachment V) constituted the fourth review of this record, and dismissed the appeal.

CONCLUSION

It is respectfully submitted that the record contains reasonable, substantial and probative evidence, that more than adequately supports the decision of the Special Inquiry Officer on the proceedings under Section 246 of the Act, and the facts alleged as grounds for deportation have been found by clear, unequivocal and convincing evidence.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

By: Charles E. Collett
CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Attorneys for Respondent.

DATED: April 17, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

= =

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the foregoing Respondent's Brief was served upon petitioner by depositing the same in the United States mail at 450 Golden Gate Avenue, San Francisco, California, addressed to the Attorneys for the Petitioner:

WILLIAM C. WUNSCH, Esq.
FAULKNER, SHEEHAN & WISEMAN
1101 Balfour Building
351 California Street
San Francisco, California 94104

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

DATED:
April 17, 1967.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

NOTICE OF INTENTION TO RESCIND ADJUSTMENT OF STATUS

UNDER SECTION 246 OF THE IMMIGRATION AND NATIONALITY ACT.

UNITED STATES OF AMERICA: In the Matter of AHMAD (DANIAL) WAZIRI Respondent	File No. A12 260 [illegible] San Francisco, California

To: Ahmad (Danial) Waziri
601 Middle Road
Belmont, California

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native and citizen of Iran;
3. You last entered the United States at New York, New York on [illegible], 1959 as a nonimmigrant student;
4. On November 23, 1960 a visa petition was approved in your behalf, granting you nonquota immigrant status under Section 101(a)([illegible])(A) of the Immigration and Nationality Act on the basis of your [illegible] to Mary Elizabeth Horsog;
5. On February 1, 1961 your status was adjusted to that of a [illegible] resident under Section 245 of the Immigration and Nationality Act on the basis of the nonquota immigrant status granted you on November 23, 1960;

ATTACHMENT

6. Your marriage to Mary Elizabeth Harney was not a bona fide marriage and was entered into solely for the purpose of evading the Immigration laws;

7. On February 1, 1961 a quota immigrant visa under the quota for Iran was not immediately available to you.

ON THE BASIS OF THE FOREGOING ALLEGATIONS, it is charged that your adjustment of status from a nonimmigrant to that of a person admitted for permanent residence under Section 245 of the Immigration and Nationality Act is subject to rescission under Section 246 of the Immigration and Nationality Act, because you were ineligible for a quota immigrant status under Section 101(a)(27)(A) of the Immigration and Nationality Act and an immigrant visa was not immediately available to you on February 1, 1961, the date on which your application for status as a permanent resident was approved.

DAVID H. [illegible]
District Director
San Francisco, California

Dated:
DHT/cmk

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A12 269 334 - San Francisco, California

In The Matter Of)

AHMAD WAZIRI) IN RESCISSION PROCEEDINGS UNDER SECTION 246
) OF THE IMMIGRATION AND NATIONALITY ACT

Respondent)

IN BEHALF OF RESPONDENT:

Mas Yonemura, Esq.
409 - 14th Street
Oakland 12, California

IN BEHALF OF THE SERVICE:

Stephen M. Suffin, Esq.
Trial Attorney
San Francisco, California

DECISION OF THE SPECIAL INQUIRY OFFICER

The respondent is a native and citizen of Iran, age 38, who was admitted to the United States as a student for a period of one year at New York on October 24, 1959. On October 13, 1960, he was married to Mary Elizabeth Herzog at Carson City, Nevada. On November 3, 1960, she filed a petition to accord him nonquota status. The petition was approved on November 23, 1960. On December 19, 1960, he filed an application for status as a permanent resident under the provisions of Section 245 of the Immigration and Nationality Act. His application was granted on February 1, 1961. On February 7, 1961, he filed a complaint for a divorce in San Francisco, California. An interlocutory decree was entered on March 3, 1961, and a final judgment of divorce granted on March 5, 1962.

ATTACHMENT II

The Service has instituted proceedings to rescind the grant of status of permanent resident to the respondent. Section 246 of the Immigration and Nationality Act provides for the rescission of the grant of status of permanent resident if the alien was not, in fact, eligible for such status. The Service charges that the respondent's marriage to Mary was not a bona fide one, having been entered into solely for the purpose of evading the immigration laws, and that consequently he was not eligible for nonquota status. Section 245 of the Act provides that the status of an alien may be adjusted to that of a permanent resident only if an immigrant visa "is immediately available to him at the time his application is approved." The nonpreference portion of the Iranian quota was greatly oversubscribed at the time the respondent's status was adjusted to that of a permanent resident. Consequently, if he were not then entitled to obtain a nonquota immigrant visa on the basis of his marriage to Mary, he was ineligible for the grant of status of permanent resident.

The respondent was called as a witness and testified along the following lines. He met Mary at a dance during the latter part of December, 1959. Thereafter he saw her about once a week until their marriage in October, 1960. Prior to their marriage they had engaged in satisfactory sexual relations a number of times. She asked him to marry her. He informed her if they married they could not live together because he had an inheritance coming from his father which he could not get unless she became a Moslem and changed her nationality to that of a Persian. He then agreed to

marry her but only on condition that she live with her parents until the matter was settled. They were married a week later. They never lived together but engaged in sexual relations once a week. She was agreeable to this arrangement. At the time of his marriage he had a brother here. He never introduced Mary to his brother as his wife, but as his girl friend. If his brother knew he had married, the brother could get the inheritance which at that time amounted to $100 per month but later became worth $500.

In explaining what led to the divorce, the respondent stated that before he was married he was treated nice and friendly. However, within a week after their marriage, he was treated as a stranger, his wife became cool to him and their sexual relations unsatisfactory. Her father, who hated him, wanted to charge him $40 a month for her support. He also learned for the first time that she had been previously married and in a mental institution. Prior to their marriage she appeared normal, but afterwards became completely different. Although he did not want a divorce, he decided to get one about four or five months after their marriage. He took Mary to his lawyer to discuss this divorce. He did not tell her beforehand why he was taking her to the lawyer because he did not want to hurt her feelings. He insisted that he married Mary because he loved her and that he did not know that by marrying her it would assist him to remain in the United States.

The respondent's former wife, Mary, was called as a witness by the

Government. She testified that she met the respondent at a dance. She then saw him once or twice a week for a period of about three months. During this time she engaged in sexual relations with him. After disappearing for the next three months, he suddenly called her, said he had been to Europe. She was angry with him because she thought she was pregnant when he left. She did not want to see him, but he insisted. He asked her to marry him. Within a couple of days they were married. Before they were married she told him that she had been previously married and had been in an institution. He told her that if he married a non-Moslem his inheritance from his father would go to his brother. She never met his brother. The respondent told her it would only be a couple of weeks until he obtained his inheritance and that she should continue to live at her parents' home. She never lived with the respondent because he did not want her to. Her father became angry when the respondent backed down on paying for her support. After the marriage her feelings toward him had not changed. She wanted to make a home and live with him. She engaged in sexual relations with him after the marriage, but they were no longer satisfactory. He said she was selfish and no good as a mate. One day he took her to his lawyer without explaining why. When she arrived at the lawyer's she was informed that the respondent wished to divorce her. She thought it had something to do with the inheritance. She was reluctant to proceed with the divorce, because she loved her husband. However, she agreed when the lawyer explained that the respondent could get married in Iran without divorcing her, but that she would be unable to remarry without a divorce. There was some dis-

cussion about an annulment of the marriage, but because she thought the respondent might come back to her during the interlocutory period of a year, she did not want the marriage annulled. About a week after obtaining the interlocutory decree he told her he had to leave the United States to get his inheritance. She did not know why he divorced her.

There was introduced as an exhibit a sworn statement which had been taken from Mary on January 16, 1963. The information in the sworn statement was consistent with the testimony she gave before me almost a year later. Her parents were also called as witnesses and corroborated her testimony in its essential aspects.

The respondent is a trickster and prevaricator. According to the Form I-20 (Certificate of Eligibility for Nonimmigrant "F" Student Status) which he presented when he came to the United States, he was destined to Utah State University where he had been accepted for a four-year course of study leading to a degree of bachelor of science with a major in political science. He never entered the university. Although students are not permitted to work without the approval of the Service, a few months after his arrival he obtained employment. When Mary filed the petition to accord him nonquota status he "certified" that he was a student and was not working. Both statements were untrue. In his sworn application for status as a permanent resident, although they had never lived together, he gave the same address for himself and Mary. In this application he also failed to show the places where he had been employed in the United States, revealing only his foreign employment. He told

Mary that if she was questioned by immigration officers, she was to say they were living together but that he was out. At the trial, when the respondent was awarded the interlocutory decree of divorce from Mary, he perjured himself repeatedly; for example - although it was at his insistence that he and Mary had not lived together, he swore that she had separated from him the day after they were married and moved to her parents' house. He went on to say that he had asked her to come back to his house but that she had refused. Although he never lived in San Francisco, he testified at the trial that he had had his residence there for four months. Furthermore, although he testified before me that his brother did not know he was married, his brother appeared as a witness at the trial and corroborated the respondent's testimony. It appears, therefore, that he also suborned his brother to commit perjury.

Although the respondent informed Mary that he would lose his inheritance by marrying a non-Moslem, this was a false statement of Iranian law. After he obtained the interlocutory decree, apparently so he would not be bothered by his wife, he sent her two postcards, one in March and one in April of 1961. In the first card which he mailed from San Francisco, he stated he was leaving for Iran. The second one, which he had someone mail from Iran, indicated that he was in that country.

I carefully observed the respondent during the hearing and I am satisfied that his veracity had not improved. Except where corroborated, I would not believe any of his testimony.

Mary is obviously not very bright and it was clear that she was emotionally

upset about the outcome of her marriage to the respondent. However, she seemed to be trying to give the facts to the best of her ability. If she had intentionally been trying to harm the respondent, she could have easily given testimony much more damaging to him. I am satisfied that her testimony sets forth the true facts in the case.

A marriage entered into by two parties without a bona fide intention of residing together as husband and wife and merely for the purpose of enabling the alien spouse to obtain benefits under the immigration laws, is not a valid marriage for immigration purposes. Matter of Slade, Int. Dec. 1257. Matter of M-, I. & N. Dec. 217. Lutwak v. United States, 344 U.S.604. In the Lutwak case, Justice Minton pointed out that "Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages in which neither of the parties ever intended to enter into the marital relationship." It follows that where the alien is the one without the intention of entering into a bona fide marriage, but deceives the citizen spouse as to his true intention, he also is not entitled to obtain any benefits under the immigration laws on the basis of such marriage.

The respondent married Mary just before the expiration of the one-year period of his admission. He arranged the situation so he would not have to live with her. He filed his complaint for divorce less than one week after his status here was adjusted. The reasons he gave for the divorce at the trial were completely at variance with those he testified to

before me at the hearing. I am satisfied he testified falsely at both proceedings. I have no doubt that he did not have an intention of entering into a bona fide marriage with Mary, that he deceived her, and that he married her solely to obtain benefits under the immigration laws. Consequently, he was not entitled to nonquota status on the basis of his marriage. I find, therefore, that he was not, in fact, eligible for adjustment of status to that of a permanent resident under Section 245 of the Immigration and Nationality Act. The grant of such adjustment will be rescinded.

IT IS ORDERED that the status of permanent resident granted to the respondent pursuant to the provisions of Section 245 of the Immigration and Nationality Act, be rescinded.

Chester Sipkin
Special Inquiry Officer

lb

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

JUL 24 1964

File: A-12269334 - San Francisco

In re: AHMAD WAZIRI

IN RESCISSION PROCEEDINGS UNDER SECTION 246 OF THE IMMIGRATION AND NATIONALITY ACT

APPEAL

ORAL ARGUMENT: June 1, 1964
On behalf of respondent: Pro se

On behalf of I&N Service: Irving A. Appleman, Esq.

The special inquiry officer ordered rescission of the grant of permanent resident status given to the respondent under section 245 of the Act. Respondent appeals; the appeal will be dismissed.

Respondent, a 38-year-old married male alien, a native and citizen of Iran, admitted to the United States as a student for a period of one year on October 24, 1959, did not enter school but took employment in January 1960. He married Mary Elizabeth Herzog, a citizen of the United States, on October 13, 1960 and obtained a nonquota immigrant status based on the marriage; he then filed an application for adjustment of status under section 245 of the Act (8 USC 1255 (Supp. 1963)). The application was granted on February 1, 1961; on February 17, 1961 he filed for divorce, receiving an interlocutory decree on March 3, 1961, and a final one about a year later.

The Service seeks to rescind the adjustment of status on the ground that the immigrant visa required by section 245 of the Act was not available to respondent at

ATTACHMENT I

the time he was granted the adjustment: The quota for Iran was oversubscribed on February 1, 1961, and his nonquota immigrant status had been invalidly procured because the marriage on which it was based had been entered into solely for the purpose of evading the immigration laws and such a marriage cannot confer benefits under the immigration laws. The facts concerning the marriage are fully stated by the special inquiry officer. Briefly, the Service relies upon testimony of Mary and her parents, respondent's poor credibility and the fact that respondent had not lived with Mary. The respondent contends that he married his wife because he loved her and that he had not lived with her first, because as had been agreed between them, they were to live apart until he, a Moslem, secured an inheritance he could not have received had it been known that he was married to a non-Moslem (pp. 16-18, 23); and second, because shortly after the marriage, the feelings of his wife and her parents toward him changed and he was made to feel unwanted; and his own feelings changed when he discovered both that his wife had been previously married twice (she had informed him that she had been married only once before) and that she had been in a mental institution (pp. 29-32, 35-6, 39-41, 142-6, 156).

The special inquiry officer found the respondent was not a credible witness. The conclusion is based both on his observation at the hearing, and evaluation of the actions of respondent: He did not enter a school of higher education but took employment although he obtained entry to attend a university; he falsely certified to the Service in December 1960 that he was a student and not working (Ex. 4; pp. 13, 28-9); he failed to show in his application for adjustment of status in January 1961 that he had been employed and that his wife was not living with him (Ex. 2; pp. 24-7); he had perjured himself at his divorce trial by stating that his wife had left him the day after the marriage al-

though it had been at his insistence that the parties had not lived together; he had tricked Mary into believing he had gone abroad.

Respondent explained his actions in failing to enroll at the university as follows: He had come to the United States to study political science at Utah State University but upon arrival, did not feel he had to enroll because he had not known English well enough and because his clothing and possessions were in a suitcase which had been lost on his arrival (apparently requiring him to live with his brother); he undertook to study English in San Francisco where his brother lived. Respondent's explanation hardly enhances his credibility. Respondent had some knowledge of English. He knew enough English to write out in English the answer to several questions in English on his certificate of eligibility for a student status executed before the consul in Germany (Ex. 6; p. 150). In this certificate respondent stated that his knowledge of English was inadequate and that the university to which he was going had accepted him for a full program in English; the university itself certified on the same form that extra help in English would be given if necessary (Ex. 6). Since respondent knew he needed help in pursuing a university program, and since he knew the university would help him, his failure to go to the university for the alleged reason that he needed help in English is an indication that he used the student route to gain entry.

Respondent explains his actions in taking employment without obtaining permission as the result of ignorance of the fact that permission was required. The explanation must be rejected in view of his deliberate concealment of the fact that he was working, in his application for adjustment of status and in his statement concerning his assets. Respondent's explanation of the false testimony he gave at the divorce proceeding was

that his answers were guided by gestures of his attorney (pp. 148-150). While many of the respondent's answers at the divorce trial were categorical, the specific information he gave in request to several of the questions reveals an understanding of English. Furthermore, it must be noted that respondent had been in the United States for over 16 months at the time. Respondent must assume responsibility for the false information he furnished at the divorce proceeding.

Respondent's attempt to deceive Mary into believing that he had returned to Iran after the divorce is explained by him at oral argument and at the hearing of October 17, 1963 as motivated by a desire to avoid harming her feelings. This explanation appears to have been an afterthought. At the hearing on October 17, 1963 he explained that he had attempted to give Mary the impression he was abroad so that she would leave him alone (p. 35).

Further reflection upon respondent's credibility is his testimony that he hid the fact of his marriage from his brother because he feared that the brother would use such information to obtain the inheritance for himself (p. 20). Despite this fear, the respondent used his brother as a witness in the divorce proceeding in March 1961 (Ex. 17) although the inheritance was still not his and would not be his until the end of 1961 (p. 151). We believe the special inquiry officer's finding that the respondent is not credible is fully justified.

At oral argument respondent attempted to cast doubt upon Mary's credibility. She testified that respondent had instructed her to Immigration Service investigators falsely, if they should question her, that he was living with her at her parents' home (pp. 59-60). Respondent claims that Mary's testimony is incredible.

since the address he had shown in his application for adjustment of status was not the address of Mary's parents but the address at which he had actually been living and therefore, the address at which investigation would have been made. Respondent overlooks, however, the fact that the visa petition filed by his wife reveals that she was living with her parents and that respondent's address was the same (Ex. 3). Since respondent had never lived with his wife at that address, it is reasonable to accept Mary's testimony concerning the instructions the respondent had given her. (It is to be taken into consideration in evaluating Mary's testimony that although she declined to appear until subpoenaed by the Service, she testified in a manner very hostile to respondent (p. 65).)

At the hearing evidence was introduced to establish that the law of Iran did not prevent a Moslem from inheriting money even though he were married to a non-Moslem. At oral argument, the respondent's position, stated rather confusedly, appears to be that it was not because of Iranian law that he feared to make known his marriage to a non-Moslem but because his grandfather had imposed a condition that the money go to the oldest son, only if the oldest son were married to a Moslem. The explanation appears an afterthought to evade the force of the Service evidence. The testimony of Mary and her parents makes no mention of the fact that the condition had been imposed by the grandfather nor does the respondent's explanations at the hearing refer to the grandfather. Even if the explanation is true, the fact that respondent resorted to subterfuge in his effort to obtain his inheritance is further indication that he lacks credibility.

Respondent, further attacking Mary's credibility, contrasts Mary's alleged recall of events that happened four years ago and her alleged inability to remember that eight months prior to the hearing she had signed

a statement. No citation is made to a specific portion of the record; however, we believe that respondent may have reference either to the fact that Mary testified that she remembered signing the visa petition in October 1960 but could not recall using the red ink in which the signature appeared (pp. 69-70), or to the only statement of recent date signed by Mary - the sworn statement taken from her on January 6, 1961 (Ex. 14). Mary stated that she could not recall signing this sworn statement; her attempt to explain about the signing was cut short (p. [illegible]), but she did recall initialing each page (pp. 65-66). We believe that Mary revealed a good ability to recall events concerning which she testified; we find no unusual contrast between ability to recall distant and present events; moreover, her testimony is in essential part corroborated by her parents.

We believe the Service has established that the respondent's marriage was entered into solely for the purpose of enabling him to adjust his immigration status. Such a marriage is not valid to confer benefits under the immigration laws (Matter of [illegible], 8 I. & N. Dec. 217). Respondent was not entitled to a nonquota status. He was not eligible for the issuance of a visa at the time he received his adjustment of status; he was, therefore, ineligible for the relief he obtained. The appeal will be dismissed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

Chairman

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ile: A12 209 334 - San Francisco, California

n The Matter Of)

AHMAD WAHIAI)
)
Respondent)

IN RESCISSION PROCEEDINGS UNDER SECTION 246
OF THE IMMIGRATION AND NATIONALITY ACT

N BEHALF OF RESPONDENT:

illiam C. Wunsch, Esq.
91 California Street
an Francisco, California

IN BEHALF OF THE SERVICE:

Stephen M. Griffin, Esq.
Trial Attorney
San Francisco, California

DECISION OF THE SPECIAL INQUIRY OFFICER

he respondent was admitted to the United States as a nonimmigrant student n October 24, 1959. On October 13, 1960, he was married to Mary Elizabeth erzog, a citizen of the United States. On the basis of this marriage he equired nonquota status. Thereafter he applied for and was granted the tatus of a permanent resident under the provisions of Section 245.

n April 8, 1964, I entered a decision in this case finding that the re- pondent's marriage was not a bona fide one and had been entered into solely o obtain benefits under the immigration laws, and ordered that the status of ermanent resident granted the respondent pursuant to the provisions of ection 245 of the Immigration and Nationality Act, be rescinded. On July 4, 1964, the Board of Immigration Appeals dismissed his appeal from the ecision. The respondent then employed new counsel who filed a motion to

reopen so that additional evidence could be adduced. On January 19, 1969, the Board granted the motion.

At the hearing before me on December 9, 1968, Mary had testified, among other things, that she had met the respondent at a New Year's dance in January, 1960, and then she saw him once or twice a week. In response to the question of how long this relationship had gone on, she answered, "Well, I don't know, maybe three months, something like that. Then he left, maybe for three months, then he had called me at my place of work and insisted on seeing me somewhere in that vicinity." (Tr. p. 48) When questioned about the period when he was away, she testified, "I don't know. I don't know how long he was gone. It was approximately three months I had not seen him because I don't know exactly how long he was gone - or somewhere like that." (Tr.p.49) She concluded this phase of her testimony by saying, in response to a question as to how soon they had married after his return, "Oh, the next day or a couple of days after that. It was very fast." (Tr. p.49)

Present counsel contended in his motion that this portion of Mary's testimony was unbelievable. He pointed out that between the time she met the respondent and their marriage there was in total a three-month period of absence and a three-month period when she did not see the respondent, whereas the evidence showed that over nine months elapsed between their meeting and marriage. The respondent had testified that he had seen Mary about once a week from the time he met her until they were married. At the reopened hearing to show that Mary had seen the respondent during the summer of 1960, when the respondent had supposedly absented himself, he called as his three witnesses, [illegible]

Waziri, the respondent's brother. Hashmag Waziri testified that he [illegible] lived with him at Los Altos, California, from the time of his arrival in the United States in October, 1959, until sometime in February, 1960, when his brother went to Palo Alto, California, to live. He saw Mary [illegible] his own home and his brother's residence on Saturday mornings when he went there to visit. He saw her there in June or July of 1960.

Another witness was Mrs. Jean Harmon Whiteman, a friend of the respondent. Mrs. Whiteman testified that she first made the respondent's acquaintance early in 1960, when he was living with his brother in Los Altos. In the spring of 1960 he moved to Palo Alto. On her way from work, once in a while she would stop in to see how he was getting along. This continued until September of 1960. During these visits she saw Mary twice, but did not speak to her. This took place in the summer of 1960, most likely in July or August or possibly in September. She identified a film strip taken of herself, which also bears a later sequence in which Mary appears, as having been taken between July and September, 1960. She associates having seen Mary at the respondent's residence during the summer because the foliage was the summer type of foliage rather than fresh green of spring, and she is of the opinion that the sequence of the film in which she appears was taken in the summertime because of the state of her tan.

The respondent testified that the film strip in question was taken between July and September, 1960.

Mary had previously been married to one, Jack Caruso. This marriage had been entered into on May 28, 1960 and was terminated when Mary obtained an

annulment on July 14, 1960. In his motion counsel [illegible] noteworthy similarities in Caruso's and the respondent's [illegible] with Mary as follows: "(1) the fact that Mary proposed marriage [illegible] instance; (2) Mary's marked cooling of affection immediately [illegible] marriage; (3) Mary's unstable behavior immediately after each marriage; (4) [illegible] manifestation immediately after each marriage of Mary's desires [illegible] of her parents."

Counsel called Caruso as a witness. This witness, who has been married four times and is presently divorced, testified that he first met Mary in 1956 at a dance. Thereafter he dated her about two times a week for a period of two or three months. In the early spring of 1960 he resumed his dating, which took place about two times a week. About three or four months later Mary asked him to marry her, and they were married on May 28, 1960 at home, [illegible]. Thereafter they moved into the home of Mary's parents. They had their own bedroom and engaged in marital relations. After three weeks she felt that the marriage was a mistake, wanted to get an annulment, and to call the whole thing off. He left her parents' home on June 18, 1960. During the time he lived with her she was home every evening.

It is obvious from Mary's testimony that she was not attempting to be precise and that her estimates of the periods during which the respondent dated her and during which he disappeared were rough approximations of the [illegible] of events. Neither the Trial Attorney nor respondent's then counsel [illegible] considered the discrepancies important since the matter was not [illegible].

Testimony as to events which have taken place sometime in the past is [illegible]

riously inexact; particularly when no attempt is made to explain it. Indeed, the testimony of the respondent's own witness illustrates this. Caruso testified that he had resumed his dating with Mary in the early spring of 1960, and that three or four months later Mary had asked him to marry her, and they were married on May 28, 1960. From March [illegible] 1960, the earliest date of spring, to May 28, 1960 is obviously less than three or four months. As another example, Huscheng Wazirl testified that his brother moved to Palo Alto in February, 1960, whereas Mrs. Whiteman testified that he had moved in the spring of 1960. The discrepancies in the testimony of the witnesses are of no particular consequence and I only mention them because counsel has stressed the discrepancies in Mary's testimony.

I hardly think the matter important, but even if I did, I do not think that the evidence presented to show that Mary had been seen with Wazirl in the summer of 1960, particularly impressive. Huscheng Wazirl admitted that his memory was poor. He had been visiting his brother's residence regularly after his brother had moved and seen Mary there on many occasions. That he could fix with any sort of definiteness the times that he had seen Mary at his brother's residence is open to serious question.

Mrs. Whiteman had fixed the time that she saw Mary at respondent's residence as having occurred during July, August or September of 1960. I have grave doubts as to the accuracy of her testimony concerning a person whom she had actually met more than four years before, particularly when the time of which she testifies is predicated on such an ephemeral thing as the presence of [illegible] at that time of the year. Her identifying the [illegible] month,

been taken in July or August based on the state of her tan is hardly probative, either. The summer swimming season in the area of San Francisco very often starts in April.

Mary's testimony did not reflect the alleged similarities in her marital experiences with Caruso and the respondent. She testified that after her marriage to the respondent her affections had not changed, the respondent's had. The record establishes that it was he, not she, who sought the divorce. As pointed out, in effect, by the Trial Attorney in his brief of December 10, 1964, in opposition to the motion to reopen, Mary's marriage to Caruso supports her testimony that there was a period between January, 1960 and October 13, 1960, when Mary did not see the respondent.

At the time the respondent entered the United States he was destined to Utah State University. He never attended that school. Testimony was taken and documentary evidence presented for the purpose of amplifying the respondent's reasons why he had failed to do so. According to his testimony, when he arrived in the United States he found that his suitcases containing his clothes had not followed him. He engaged an attorney to look into the matter. This attorney subsequently obtained reimbursement for the loss of the suitcases in the sum of $330. He gave as his reason for not attending the university the fact that he had lost his suitcases and that could not afford to go to that school, but because his English was good he could attend other local schools. The Form I-20 which the respondent executed showed that his knowledge of the English language was inadequate, and that the institution to which he was destined was equipped to offer the

had accepted him expressly for a full program of study of English. This form also shows that he was going to receive $175 monthly from his parents and sponsor. I cannot understand why the respondent could not have gone to school while his attorney was attending to the matter of his [illegible], and why he could not have used the $175 monthly to support himself while attending school.

I might add that the Form I-20, which he presented to obtain his student visa, expressly states that if after being admitted, a student desires to transfer to another school, college or educational institution other than that specified at the time of his admission, the student must make a written application in advance to the nearest immigration office for permission to make such a transfer. He never made such application. The form also states that no student admitted to the United States may be employed for a wage or a salary unless permission to do so had been granted by the Service. The respondent did not ask for such permission before engaging in employment.

The respondent had testified at the original hearing that if he married a non-Moslem he would lose his inheritance. It appeared to me that the respondent attributed the fact that he would lose such inheritance to the laws of Iran. At the reopened hearing it developed, however, that he would lose the inheritance only because of the provisions of the will of his grandfather. In the consideration of this matter does the respondent no credit. He [illegible] that the terms of this will came when the respondent married [illegible] entitled to the inheritance. He concealed the [illegible] he [illegible] [illegible]. As the Board pointed out at the hearing of [illegible], [illegible] the

fact that he "resorted to subterfuge in his effort to obtain her [illegible] is further indication that he lacks credibility."

Counsel also requested that I consider other matters raised by [illegible] in his motion. In his motion he states, "It is extraordinary that [illegible] Mary's mother nor her father in their testimony took any note of her marriage to Caruso which occurred during the very period of time that they testified that Mary was concerned with maintaining her relationship with respondent. Mary's mother not only avoided any mention of Mary's marriage to Caruso but made the remarkable comment that during the period of Mary's relationship with respondent she had no other friends."

Mary's mother did not mention the Caruso marriage in her testimony for the simple reason that she was not asked concerning it. Mary's mother did mention the marriage. (Tr. 98) Mary's mother's testimony that [illegible] other friends than the respondent obviously relates to the time when she was going with the respondent.

Counsel further remarks that "in her application for a license to marry Respondent, Mary stated that she had been married only once before and did not mention her marriage to Caruso. In her petition to classify respondent for issuance of immigration visa Mary also failed to mention her marriage to Caruso. It is obvious that she endeavored to conceal her marriage to Caruso from respondent, and her testimony that she told him [illegible] prior to their marriage is incredible." Mary testified to the effect she did not understand whether a marriage which was annulled was [illegible] a marriage; consequently she could, in good faith, not have mentioned [illegible]

marriage to Caruso in either her application for a license or [illegible] petition. In any event, it is not obvious from her [illegible] her marriages in those documents that she did so to conceal her [illegible] to Caruso.

In my decision of April 8, 1964, I found the respondent to be a [illegible] and prevaricator who had married Mary solely to obtain benefits under the immigration laws. None of the evidence adduced at the reopened hearing persuades me that these findings were in error. If ever there was a case of a fraudulent marriage, this is it. No change will be made in my previous order.

IT IS ORDERED that no change be made in my decision of April 8, 1964, rescinding the status of permanent resident granted to the respondent pursuant to the provisions of Section 245 of the Immigration and Nationality Act.

Chester Sipkin
Special Inquiry Officer

[illegible]

[illegible]

[illegible]

MATTER OF [illegible] WAZIRI Respondent	FILE: [illegible] AT [illegible] [illegible]

Secret Special Inquiry Officer [illegible]

Hearing taken on [illegible]	at 630 Sansome Street San Francisco, California
Transcribed by [illegible]	Transcribed by [illegible]
Witnesses: None	Language: English

APPEARANCE OF SERVICE:

[illegible], Esq.
[illegible]

[illegible]
Counsel
San Francisco, California

APPEARANCE OF RESPONDENT:

[illegible]

[illegible]

San Francisco, California

[illegible]

[illegible] that to the best of my [illegible] the [illegible] [illegible]

[illegible]

[illegible]

[illegible]

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

JAN 15 196[illegible]

File: A-12269334 - San Francisco

In re: AHMAD WAZIRI

IN RESCISSION PROCEEDINGS UNDER SECTION 246 OF THE IMMIGRATION AND NATIONALITY ACT

MOTION

ON BEHALF OF RESPONDENT: William C. Wunsch, Esq.
Faulkner, Sheehan & Wiseman
351 California Street
San Francisco, California

ON BEHALF OF I&N SERVICE: Stephen M. Suffin
Trial Attorney
(Brief filed)

The case comes forward pursuant to a motion of counsel for the respondent requesting that the proceedings be reopened on the ground that material new evidence not previously available to respondent is now available to show his good faith in entering into the marriage.

The record relates to a native and citizen of Iran, 38 years old, male, who was admitted to the United States as a student for a period of one year on October 24, 1959. He did not enter school but took employment in January 1960. He married Mary Elizabeth Herzog, a United States citizen, on October 13, 1960 and obtained a nonquota immigrant status based on that marriage and also obtained an adjustment of status under Section 245 of the Immigration and Nationality Act on February 1, 1961. On February 17, 1961 he filed for a divorce, receiving an interlocutory decree on March 3, 1961 which became final about a year later.

On April 8, 1964 the special inquiry officer, in rescission proceedings under Section 246 of the Immigration and Nationality Act, ordered that the status of permanent residence granted the respondent pursuant

ATTACHMENT

to the provisions of Section 245 of the Immigration and Nationality Act be rescinded. On July 24, 1964 we dismissed the appeal from the order of the special inquiry officer. The conclusion that the respondent's marriage was entered into solely for the purpose of enabling him to adjust his immigration status and that such a marriage was not valid to confer benefits under the immigration laws was reached after weighing the credibility of the testimony of the respondent, the fact that he never lived with her and the adverse testimony of the respondent's wife, Mary Elizabeth Herzog, and her parents.

The instant motion to reopen sets forth that a witness, Jack Caruso, a prior husband of Mary Elizabeth Herzog has become available and sets forth his affidavit regarding his relationship with the respondent's wife and takes issue with her statement that the marriage was not consummated or that she did not know his brother. The motion also contains a copy and a translation of an Iranian decision that the respondent was entitled to the inheritance about which he had testified and states that a further explanation would be made in the event a reopened hearing was granted; a letter from the transportation company regarding the delay in settling the respondent's claim in respect to his lost luggage; an affidavit of respondent's brother, Huschang Waziri, regarding the respondent's arrival in the United States, his loss of luggage, his language difficulty and the fact that he met Mary Elizabeth Herzog on numerous occasions during 1960. The motion further sets forth that the respondent had a language problem and was unable to pass the standard college entrance examination in English in the summer of 1960 and offers to explain his failure to enroll at Utah State University.

Our prior decision in this case was based upon weighing the credibility of the respondent's testimony regarding the various events, including his failure to attend the university after admission as a student, failure to live with his wife, and various other unfavorable aspects of his testimony together with the adverse testimony of Mary Elizabeth

Herzog, the respondent's citizen wife, and her parents. The motion sets forth new material which seeks to overcome the adverse effect of the credibility with which respondent's testimony was received. Upon a full consideration of all of the matters set forth in the motion to reopen, the motion to reopen will be granted. The granting of the motion should not be taken as a belief in the matters set forth therein but a new decision should be rendered on the basis of the additional evidence adduced at a reopened hearing.

ORDER: It is ordered that the prior order of this Board dated July 24, 1964 be withdrawn.

IT IS FURTHER ORDERED that the proceedings be reopened to receive additional testimony and evidence bearing on the bona fides of the marriage and for such other action that may appear appropriate.

Thos. S. Trimble
Chairman

Memorandum

TO : Chairman, Board of Immigration Appeals, Washington, D. C.

DATE: December 14, 1964

FROM : C. W. Fullilove, District Director, San Francisco, California

SUBJECT: Ahmad Waziri, A12 269 334.

Subject record file is forwarded for consideration of the respondent's attorney's motion for reopening of proceedings for recission of adjustment of status under Section 246 of the Immigration and Nationality Act.

The respondent is not in custody and his deportation is not imminent.

C W Fullilove

attachment:

Record of proceedings

208

No. 21130

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TONKIN CORPORATION OF CALIFORNIA, dba SEVEN-UP BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of Supplemental Decision and Order of the National Labor Relations Board.

BRIEF FOR PETITIONER.

HILL, FARRER & BURRILL,
M. B. JACKSON,
KYLE D. BROWN,
411 West Fifth Street,
Los Angeles, Calif. 90013,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Statutes

No. 21130

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TONKIN CORPORATION OF CALIFORNIA, dba SEVEN-UP BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of Supplemental Decision and Order of the National Labor Relations Board.

BRIEF FOR PETITIONER.

I.
JURISDICTIONAL STATEMENT.

This matter is before this Court upon the Petition of Tonkin Corporation of California, dba Seven-Up Bottling Company of Sacramento (herein referred to simply as "Employer", or "Petitioner"), for review of a Supplemental Decision and Order of the National Labor Relations Board (herein referred to simply as "Board" or "Respondent"), pursuant to Section 10(f) of the National Labor Relations Act (herein referred to simply as the "Act") as amended (61 Stat. 136; 73 Stat. 519; 29 U.S.C. Section 51 *et seq.*)[1]. The Board's

---

[1]The pertinent statutory provisions of the Act are reproduced in Appendix A, *infra.*

Supplemental Decision and Order [R. 81-86][2] issued against the Petitioner on 27 May, 1966, and is reported at 158 NLRB No. 110.

The Board's jurisdiction in the premises is not disputed by Petitioner. This Court has jurisdiction pursuant to Section 10(f) of the Act, in that Petitioner is engaged in business in the State of California within the Ninth Judicial Circuit and the unfair labor practices set forth in the complaint of Respondent's General Counsel allegedly occurred within the territorial boundaries of the Ninth Judicial Circuit.

II.
THE FACTS.

Upon charges filed by one Edward J. Farrell, ostensibly on behalf of the Sacramento Seven-Up Employee's Union (herein called simply "Union" or "Independent Union") [GCX1(a) and 1(c); R. 3-4], the Board, on 10 June, 1964, entered its Decision and Order adopting the finding of its Trial Examiner that Petitioner had violated Section 8(a)(1), (2) and (3) of the Act [R. 71-2]. The gravamen of the Board's original Decision was that the Petitioner had "locked-out" its employees to force immediate acceptance of contract terms by the incumbent Independent Union and used the contract gained thereby to prevent a rival Teamster's union from petitioning for representation. The Petitioner, according to the Board, had

---

[2]References to transcript "Volume I, Pleadings" will be indicated herein by "R"; references to "Volume II, Transcript of Record", by "Tr". The designations "GCX" and "RX" will be used to designate, respectively, exhibits presented by the Board's General Counsel and this Petitioner, who was designated "Respondent" in the original proceedings.

therefore, unlawfully interfered with the *administration* of the Independent Union in violation of Section 8 (a)(1)(2) and (3) of the Act [R. 23]. Thereafter, on November 10, 1965, this Court issued its decision, reported at 352 F. 2d 509, enforcing the order of the Board only insofar as it related to the reinstatement and compensation of an employee, Barwise, but remanding the issues involved in the remaining "lock-out" portions of the order to the Board for further consideration, and such proceedings as the Board might deem appropriate, in light of the decision of the United States Supreme Court in *American Ship Building Co. v. NLRB,* 380 U.S. 300, rendered subsequent to the date of the Board's original Decision and Order. This action was taken even though this Court had on June 7, 1965, previously denied the Board's request that the case be remanded to it for reconsideration in view of *American Ship.*

On May 27, 1966, the Board issued its Supplemental Decision and Order, reported at 158 NLRB No. 110 [R. 81-86]. Not only did the Board adhere to its original decision that the Petitioner's conduct unlawfully interfered with the Independent Union's administration but it also found that the so-called "lock-out" was motivated by purposes violative of Sections 8(a) (1) and (3) [R. 85-86]. These alleged violations stem from events occurring during contract negotiations conducted in the spring of 1963 between Petitioner and the Independent Union.

In this connection, the Board made findings expressly predicated upon what it terms the "essential facts" in the case [R. 82]; in reality, as Petitioner

will demonstrate, these "facts" are either not supported by substantial, credible evidence in the record or constitute isolated incidents lifted out of context. In approaching a fair consideration of the issues here presented it is believed essential to detail rather completely and in chronological fashion the events upon which this action is founded.

A. Petitioner's Business and Organization.

Petitioner is engaged in business as a bottler and distributor of soft drink products, the principal one being "Seven-Up", in the City of Sacramento and surrounding areas. Since April 4, 1962, the Company has been directed by Harry Tonkin as President and Millard Tonkin as Vice-President and General Manager [Tr. 241-42; 290-91].

Immediately beneath the Tonkins organizationally, and directly responsible to them, is a Sales Manager who directs and supervises a Sales Department, which is normally comprised of three supervisors and twelve route salesmen [Tr. 197-98; 242-43; 291].

Petitioner also employs four or five people in the plant area to perform work on the production line, in the plant yard and for general maintenance. In the spring of 1963, approximately twenty persons were in the employ of Petitioner, twelve of whom were route salesmen and four or five of whom were plant and production employees [Tr. 67]. With the exception of the route supervisors and plant clerical help all of Petitioner's employees, including plant employees and route salesmen were members of the Independent Union [GCX 2].

B. The Independent Union.

The Independent Union had actively represented Petitioner's employees for many years before ownership of Seven-Up was acquired by the Tonkins [Tr. 353; 403]. In its capacity as collective bargaining agent, the Independent had annually negotiated collective bargaining agreements with Petitioner. The contract in effect when the Tonkins assumed control had been arrived at by bargaining between the Independent's negotiating committee and L. G. Stellings, the former owner of Petitioner. It provided, among other things, for a 12½ cent per hour raise and extended for a term of one year from 1 April, 1962 [Tr. 410-411].

From the outset the Independent had shown itself to be a viable organization. It had, for example, retained and paid for its own legal counsel in connection with its incorporation and the drafting of by-laws [Tr. 409-411]. Moreover, it maintained a separate bank account for the deposit of Union funds, separate membership records and minutes of meetings [Tr. 409-10].

Union funds were used to pay for legal counsel, to purchase membership cards and to pay for stationery, postage and other administrative expenses [Tr. 414; 418]. With the exception of the meeting held on 29 March, 1963, detailed below, meetings were always held at locations arranged and paid for by the Union [Tr. 412].

During the year 1962 the Independent held approximately four or five meetings relating to contract negotiations for that year, election of officers, incorpora-

tion, processing of grievances and other matters [Tr. 422; 410; 413; 415].[3]

No evidence whatever was adduced indicating that Petitioner, at any time, participated in or furnished any assistance or services in connection with Union affairs.[4]

C. Initial 1963 Contract Negotiations.

In January of 1963 James Elder, who had previously worked as a mechanic and forklift driver in the plant was assigned to a position in Petitioner's Vendor Department [Tr. 116; 119]. Elder at that time was the President of the Independent Union, having been first elected to that position in November of 1961 [Tr. 403]. As a consequence of his assumption of different duties, Elder relinquished his post and resigned as a member of the Union [Tr. 125-26; 85-86; 11; 403-04].

Thereafter, the Union, on about 15 February, 1963, called a meeting at the American Legion Hall in Sacramento for the purpose of electing new officers [Tr.

---

[3]These facts, together with the recital below concerning the numerous meetings held in early 1963 regarding contract negotiations refute the Board's contention that, "Meetings of the Union have been irregular and infrequent and largely social." [R. 82].

[4]In this connection, compare the Trial Examiner's statement in an opinion adopted by the Board [R. 71-72] that, "There exists in this record no evidence that before the events of late March or early April [1963], the Respondent did anything which might be characterized as assistance to or domination of the Union within the Act's meaning," [R. 21] with the Board's wholly contradictory subsequent statement in its Supplemental Decision, that this Petitioner locked out its employees ". . . for the purpose of *keeping* the incumbent Union subservient to it as a bargaining representative . . ." [R. 85]. (Emphasis added).

10; 12; 85]. The membership elected Howard Hill, President, and William Barwise, Secretary-Treasurer [Tr. 10-11; 85]. Both of these men were route salesmen.

About one week later another meeting of the entire membership of the Union was held at Burich's Grill in Sacramento at which time the Union elected a Board of Governors comprised of Bernal Williams, Donald Olson, and Richard Howell, all route drivers, and a fourth member, Roy Fletcher, from the plant crew [Tr. 12-13; RX 1]. The meeting then turned to the discussion and formulation of specific proposals to management for the 1963 contract, as the current contract was due to expire on 31 March, 1963 [Tr. 12-13; 252]. A series of demands were agreed upon, typed up and presented to management a short time later in the form of a document entitled "7 Up Employees Union Requests for 1963 Contract" [Tr. 13-14; RX 1]. These requests encompassed a broad range of subjects, including wages, hours, overtime pay, health and welfare, sick leave, holidays, seniority and retirement [RX 1].

Over the period of the next several weeks the Union Negotiating Committee, consisting of its officers and the Board of Governors, met with the Tonkins several times in a mutual attempt to reach accord on a new agreement [Tr. 13-18; 87-88; 245-53; 293-94].

D. The Events of 29 March 1963.

(1) Management Addresses the Employees.

Because the termination date of the present contract was fast approaching and no agreement had yet been reached, the Tonkins felt that the progress of negotiations might be assisted if they were to address the employees and attempt to explain personally the

terms of management's offer and the reasons underlying its position [Tr. 254]. Accordingly the Tonkins arranged for a hall at Alhambra and "N" Streets in Sacramento and posted a notice on the plant bulletin board that a meeting of employees would be held there following work on Friday, 29 March, 1963 at 5:00 P.M. [Tr. 19; 254]. All of the driver salesmen and plant employees attended; only the Tonkins were present representing management [Tr. 19; 89; 324-25].

The meeting was opened by Harry Tonkin who outlined the terms of the Company's offer [Tr. 20; 255]. He stated that because the business had only recently been acquired and its financial situation was not yet sufficiently strong, it was not possible to do as much as they might like [Tr. 255-7]. Nonetheless, the Company was prepared to offer employees a raise of $3.00 a week the first year and $3.00 the second year. Tonkin also indicated that the Company would accede to the Union's demand that it pay the plant and production employees time and one-half for overtime [Tr. 255; 22; 295-6].

In response to questions raised from the floor the parties then variously turned to a discussion of subjects such as the bonus arrangement, sick leave, paid holidays and vacations, as well as scale in other industries [Tr. 255-8; 21-2; 160; 295-6]. For his part, Harry Tonkin agreed to reconsider the basis for computing the route salesmen's bonus (which was, for route salesmen, the counterpart of overtime compensation for the plant and production employees), in an attempt to improve the system [Tr. 256-57]. In re-

sponse to questions regarding wage scales in other industries, Tonkin observed that in his view such wage scales were not relevant to the soft drink industry; however, he went on to say that the Company was willing to meet the wage rates paid by other local soft drink companies even if the rate exceeded the amount of Petitioner's offered increase [Tr. 259; 334; 340].

Both of the Tonkins emphasized that relations between the Company and the Independent Union had always been cordial, that management was trying its best to be fair in dealing with the Union's proposals and that they sincerely hoped the Union would accept their offer so that matters would be straightened out before the present contract terminated on Monday morning [Tr. 255-60; 296-97]. In this connection, Harry Tonkin noted that the Company had instituted a new health and disability insurance plan under which they had considerably bettered their obligation to employees under the existing collective bargaining agreement and he hoped that they would take this as an indication of management's attitude in continuing to improve conditions as it was able [Tr. 256]. According to employee Barwise, Tonkin stated that he knew the men had been contacted by the Teamsters Union and emphatically stated that he did not want to negotiate with that Union.[5] For his part, Tonkin freely con-

[5]The Board leans heavily on this statement attributed to Tonkin by Barwise [Tr. 21], in support of its subsequent finding of unlawful motivation for the "lock-out" [R. 82; 85]. But, as we shall see, this remark was perfectly proper, for it would have been *illegal* for Petitioner to have recognized or dealt with the Teamsters during the period in question.

ceded that the subject of the Teamsters Union was mentioned during his discussion that evening. Tonkin did state that he had heard reports of teamsters activities among the men.[6] It was the Company's position that it was obligated to deal with the Independent Union which it had recognized for many years and which, to its knowledge, represented a majority of employees. Further, Tonkin pointed out that dealing through the Independent Union presented certain advantages over membership in a union such as Teamsters since the membership might then well become involved in the consequences of disputes not their own [Tr. 271-3; 161].

Following this, Millard Tonkin briefly addressed the meeting, expressing his accord with the views of Harry Tonkin and reiterating that management was attempting to do everything possible to satisfy the employee's demands and that the Tonkins wanted to have a happy group of employees so that the business would be run amicably and productively [Tr. 257; 296-97].

With the exception of a single witness[7] no testimony was given attributing to either of the Tonkins in their remarks in this occasion, any ultimatum re-

---

[6]The "reports" alluded to by Tonkin were evidently mistaken, for no contact was had with the Teamsters until the following Sunday when Barwise and Hill met with representative Youman [Tr. 26-7].

[7]Witness Donald Olson testified that Harry Tonkin stated, "Now, those who want to go to work Monday, we have to have the contract signed tonight, . . ." [Tr. 160]. However, this testimony was not corroborated by a single employee who had been present at that meeting, including Barwise and Hill, the General Counsel's principal witnesses. Indeed, although Barwise testified that Harry Tonkin referred to the Teamsters [Tr. 20-21], he makes no mention of any such ultimatum.

garding the new contract, any assertion that it "had to be signed or else", or that any employee would be discharged or prevented from working if the contract were not signed. On the contrary, although it is evident that the Tonkins desired that their offer be accepted and an agreement reached, they left the decision on this point in the hands of the employees.

(2) The Union Meeting of 29 March, 1963.

After the Tonkins had completed their remarks, the Union's President, Howard Hill, suggested to Harry Tonkin that since the membership was already assembled, they could discuss the Tonkins' offer among themselves and ascertain whether agreement might not be reached at that time [Tr. 23; 90; 259-60]. Hill asked whether the Union might use the hall to conduct a private meeting, to which the Tonkins consented, and further stated that the Union's officers would contact them later at the plant office to communicate the results of the meeting [Tr. 23; 90; 260]. Accordingly, the Tonkins left the meeting hall and proceeded to their office to await the subsequent conference with Union officials [Tr. 260].

In the meantime, the Union's membership began a discussion of the Company's offer. It was obvious from the outset that the plant employees wanted to accept the contract the Tonkins had offered because their demand for overtime pay had been met [Tr. 23; RX 1]. However, there appeared to be some disagreement on the part of the route salesmen. No formal vote was taken by the employees mainly because the plant workers, who were satisfied with the proposed

pact, began leaving the meeting [Tr. 24]. After some initial reservation it was the consensus of the route drivers that they, too, would accept the Petitioner's offer, with the proviso that if a higher rate were paid in the industry, Petitioner would match it. Thereupon the Union's officers and Negotiating Committee were authorized to communicate this to the Tonkins and, if accepted, to agree upon a contract [Tr. 23-5; 83; 90; 340; 334; 350-1; 178].

Since Harry Tonkin had already indicated management's willingness to match whatever was paid in the industry [Tr. 259], it was the general understanding of the men when the meeting ended that things were settled, the terms agreed to, and that a contract would be signed as a matter of course on Monday morning [Tr. 83; 100; 334; 340; 350-1].

(3) The Subsequent Meeting at Petitioner's Office.

That same evening, at the conclusion of the Union's meeting, the Union's Negotiating Committee and officers proceeded to Petitioner's office and communicated the decision of the membership to the Tonkins. Those present representing the Union included Howard Hill, William Barwise, Bernal Williams and Donald Olson [Tr. 260]. These men reported to the Tonkins that the membership had agreed to accept their wage offer and their proposal to pay time and one-half to plant employees if management would agree to match any further increase paid generally in the industry. To this the Tonkins agreed, and they volunteered to ascertain that night whether there had been any developments at Pepsi-Cola in this respect, as that company was also

engaged in negotiations [Tr. 25-6; 100-02; 178-183; 260-4; 297-9].

After this initial agreement the parties turned to a discussion of additional points concerning paid holidays and sick leave. With regard to holidays, management agreed to the Union's demand that an employee's birthday be an additional paid holiday, and this was accepted without the necessity of its being incorporated in the contract [Tr. 108-9; 261]. The Tonkins further agreed to compensate employees for time-off due to sickness on a case-by-case basis, their one reservation being that by incorporating it in the contract as a fixed amount of annual time, they feared that abuses would result. The men were assured, however, that no-one who lost time from work as a result of actual sickness would be docked. This point was likewise accepted [Tr. 25-6; 100-02; 83; 178-83; 260-4; 297-9].

Additionally the matter of the route salesman's bonus was brought up and management agreed to look into the matter of the bonus and to improve upon the method of its computation, which was, in fact, later done.[8]

On the subject of the health and disability program, management pointed out that it had already instituted a change in the present plan under which it contributed far more than the fifty percent required of it under

---

[8]This point is corroborated by the General Counsel's witness, Hill: "Well, there is a—that bonus thing is a nightmare, they said they would work on it and do the very best they could, and they did. They did make changes in it, which was to the benefit of the employees, and that they also in the near future, if this one plan didn't work out, that they would be glad and willing to try another plan. In other words, an incentive program that would help the employees, they were willing to go along on one and work it out." [Tr. 109; 262].

the existing collective bargaining agreement, but stated that it would attempt to improve further on this plan as it was able. In addition, the Tonkins agreed to consider a pension plan, but pointed out that Petitioner was not yet financially able to qualify for one [Tr. 25-6; 83; 100-02; 109; 178-83; 260-4; 297-9].

The Negotiating Committee expressed its satisfaction with management's position on these points, and everyone shook hands on the agreement. The meeting closed in an atmosphere of cordiality and it was the impression of virtually everyone present and who testified that agreement had been reached. The officers stated that the agreement would have to be submitted to the men for ratification but since all of the demands had been satisfactorily resolved, it was assumed that ratification would be a mere formality [Tr. 297-9; 183; 25].

E. The Independent's Officers Meet With Teamsters on 31 March 1963 and Begin Solicitation of Members.

The following Sunday, 31 March 1963, Hill and Barwise, the Independent's President and Secretary-Treasurer, respectively, together with Bernal Williams, a member of the Board of Governors, attended a meeting at the home of a Pepsi-Cola employee at which there was present a local Teamster Union representative, one Youman [Tr. 26-7]. It is undisputed that this was the *first* employee contact with the Teamsters [Tr. 27]. During this meeting Barwise was handed a book of authorization card forms and signed one himself [Tr. 26-27]. Following this, Barwise and Wil-

liams called on various of Petitioner's route salesmen for the purpose of soliciting their signatures on Teamster authorization cards [Tr. 28; 335-36; 341-2]. Signatures were obtained from some of the men and were refused by others [Tr. 28; 335-6; 341-2].

It is important to appreciate the timing and significance of this activity. Here are the principal officers of the Independent Union who, having represented it in negotiations with Petitioner and having reached agreement with Petitioner's management pursuant to the express direction of the membership, and having shaken hands on that agreement, *subsequently* set about soliciting authorizations from their own membership on behalf of *another union.* Evidently it did not occur to these men nor, obviously did the point impress itself upon the Board, that this conduct was in violation of the membership's mandate, in derogation and repudiation of the agreement reached with Petitioner pursuant to that mandate, as well as being in flagrant conflict with the fiduciary obligations of these men, as officers of the Independent Union, to the membership which they represented.[9] We shall return to this point at some length below in discussing whether it was not in fact the *Union's officers* and *the Teamsters Union* who combined to "frustrate the process of collective bargaining" rather than Petitioner, as found by the Board in its Supplemental Decision [R. 85].

---

[9]It is also apparent that Petitioner was unaware of this solicitation activity on behalf of the Teamsters until Barwise so stated, on Monday, 1 April, *after* the new contract with the Independent Union had been signed [Tr. 36].

F. The Events of Monday Morning, 1 April, 1963.

Since the Union's officers had expressed the wish to submit the agreement for the formal ratification of the membership on Monday morning before beginning work, Petitioner's management that morning left the lock on the gate of the parking lot enclosure across the street from the plant, where its trucks were kept[10] [Tr. 184; 264; 285; 300].

There was absolutely no intention on the part of Petitioner's management to lock its employees out of the plant premises or prevent them from working. The truck gate remained closed for the sole purpose of insuring that early starters would not leave on their routes without being notified of the meeting [Tr. 264-6; 300]. Indeed, the plant itself was open and unlocked as usual [Tr. 300; 345; 265; 68; 345].

It became apparent to the Tonkins as the morning wore on that matters were not finally settled as they had supposed [Tr. 264]. Accordingly, a meeting was held with the Union officers and the membership in the plant office in an attempt to ascertain just what the situation was. The Tonkins were advised by Hill, the Independent's President, that the matter of the new contract had been put to a vote in a meeting of men

---

[10]The testimony of the General Counsel's principal witness, Barwise, is specific on this point: "Q. Did you arrive that Monday morning about the normal time? A. About the normal time, yes. Q. And had a union meeting been scheduled that morning before starting work? A. Yes, it was supposed to have been scheduled. Q. Was that set up the preceding Friday? A. The preceding Friday we—we had told them we were going to have a union meeting. Well, at that particular Friday night we were going to have a meeting with the members before anything was done. Q. Before work that Monday morning? A. Before work that Monday morning." [Tr. 69].

held by the truck gate and the offer had been rejected by a vote of 9 to 8 [Tr. 31; 266]. The Tonkins expressed their surprise and dismay at this turn of events, stating that they had relied in good faith on the Negotiating Committee's representations, had shaken hands with Union representatives on a contract the preceding Friday night, and believed the vote of the membership that morning was a mere formality. They added that they were keeping their part of the bargain and hoped and expected that the Union would keep its and that they could rely upon the integrity of the Union's own officers [Tr. 64-6; 285; 299-300].

There is some confusion in the testimony as to what followed this meeting. Evidently the membership withdrew from the plant premises and again discussed the matter across the street. It appears that a second vote was taken which resulted in an identical 9 to 8 vote against the contract [Tr. 33; 266]. At some time during the morning, Barwise solicited additional Teamster authorizations and transmitted them to a Teamster representative who was parked in his automobile down the street from the plant [Tr. 279-80; 28-29].

The membership again returned to the Tonkins' office to report the fact that they were unable to come to a conclusion. During this second meeting, the Tonkins advised the Union's officers that they had, in the interim, contacted their legal counsel and had been advised that the oral agreement reached the preceding Friday was binding and they hoped the Union would honor it. Under these circumstances, Tonkin stated that he felt the Union was obligated to adhere to its bargain and formally execute the agreement. There

was some further discussion concerning the fairness of the terms offered and agreed to and the suggestion was made that the membership discuss it further [Tr. 33; 266-70; 299-300].

Once again, the membership retired from the plant premises to discuss the matter across the street. There is again no specific testimony concerning the substance of this meeting but apparently a consensus was reached, for in a short time the officers returned to the plant and executed the agreement they had shaken hands on the preceding Friday [Tr. 34-5; 270; 299-300].

A number of employees, including Huleva, Kaderly, Jensen and Fletcher, testified that they were completely puzzled by the confusion and delay on that morning since they, like the Tonkins, had assumed matters to have been satisfactorily settled the preceding Friday and were at a loss to understand the position of the Union officers on Monday morning [Tr. 337-8; 340; 342-4; 347; 351-2].

At the time of the execution of the agreement, Barwise volunteered the fact that he had been active among the Independent's membership on behalf of the Teamsters, and he queried Petitioner's management as to whether any reprisals would be taken because of this. This was the first notice which the Tonkins received concerning the fact of Teamsters contacts on behalf of its employees. Both Tonkins emphasized that there would be no discrimination against any employee as the consequence of any Union activity. They stated that in their view, matters had been amicably settled, by-gones were by-gones, there would be no hard feel-

ings in any quarter, and that everyone would resume work on the same basis as before [Tr. 35-6; 270-1; 299-300].

G. Receipt of Teamster's Petition.

The following day, 2 April, 1963, the Teamsters filed with the Board's Regional Office a Petition for a Representation Election among the Petitioner's employees [GCX 3A; Tr. 7]. On 5 April, 1963, Petitioner and the Independent Union each received letters from the Regional Director enclosing copies of this Petition, numbered 20-RC-5409 [Tr. 37; 303; 110; 316; RX 2]. Both letters were sent by registered mail, and the letter intended for the Independent Union bore Petitioner's address, 3310 "P" Street, Sacramento [RX 2]. The letter addressed to the Independent was picked up by Howard Hill in the plant office when he returned from his route that day [Tr. 316]. Upon opening and reading the letter, Hill asked Millard Tonkin, who was seated in the adjoining office, whether the Company had received a similar letter [Tr. 316-17]. At some point in the ensuing conversation William Barwise joined the group so that the persons present were Barwise, Hill and the Tonkins [Tr. 37; 317-18; 110].

All recalled that the conversation centered around the request in the Board's letter that copies of the Independent's contract with Petitioner be forwarded to the Regional Director, and Hill volunteered that the Union had no facilities for reproducing copies of the contract [Tr. 38; 318]. The Tonkins indicated that they could have this done if the men so desired, since they

intended to duplicate their own copies and mail them in response to the request [Tr. 316-20]. Hill and Barwise replied that they would check with their attorney and call the Tonkins back regarding this point [Tr. 316-20; 37-8].

On Saturday morning Hill telephoned Millard Tonkin at Petitioner's office [Tr. 39-40]. In the interim, he and Barwise had checked not with the attorney for the Independent Union, but rather with Woody Youman, a representative of the Teamsters. Youman had indicated to them that regardless of whether copies of the contract were sent to the Board, the Teamsters would have a hearing in the matter [Tr. 39]. Hill told Millard Tonkin that as far as the Union's officers were concerned, the Tonkins could send the contract in or not as they desired and that it was up to their discretion [Tr. 111; 39; 318].

Obviously, he and Barwise were aware of the fact that the Union, of which they were President and Secretary-Treasurer respectively, would be put in the position of appearing to disclaim any interest in the membership they represented or the contract to which it was a party, so far as proceedings on the Teamsters' petition were concerned, if the requested documentation were not furnished. Thus, it now seems apparent that although they were reluctant to have the contract sent in, they did not want to seem to be refusing to do so because of the implications this latter course would obviously carry. This, of course, fully explains Hill's decision to reply in ambiguous fashion, stating to management that it could do as it pleased [Tr. 111; 318].

On the other hand, Millard Tonkin's interpretation of this statement was entirely reasonable. He assumed that the Independent's officers desired to act responsibly and to notify the Board of its interest in the pending representation proceedings. Accordingly, at the time he sent in copies of the contract in reply to the letter addressed to Petitioner, he also addressed a letter giving the Union's return address and enclosed copies of the same contract in response to the letter addressed to it [Tr. 318-320].

This incident will be discussed again below in connection with Petitioner's contention that the activities of the *Teamsters Union* and *The Independent's officers* "rendered the incumbent Union incapable of effective and responsible representation", as found by the Board [R. 85].

H. Receipt of Original and Amended Charges.

The original Unfair Labor Practice Charge herein, dated 5 April, 1963, was received by Petitioner on Monday, 8 April, 1963 [Tr. 287; R. 3]. The Charge was filed on behalf of the Independent Union and alleged violations of Sections 8 (a)(1), (2) and (5) in that the Petitioner had purportedly dominated and interfered with the *Independent Union* and had *refused to bargain collectively with it or its representatives.* The Charge was signed and filed by one Edward J. Farrell, a person whose identity and relationship to the situation were completely unknown to the Tonkins. It was brought out at the hearing on this matter that Farrell actually was the attorney for the Independent Union, although this fact was not known to the Ton-

kins as late as 24 April, 1963 [Tr. 48; 97; 281-2; 320-1]. Significantly, then, as this Charge was initiated by the Independent Union, not the Teamsters, and claimed a refusal to bargain with it as the representative of a majority of Petitioner's employees, it contravened and disputed the claim of the Teamsters in this respect as evidenced by their Petition for an Election filed the preceding Tuesday [GCX 3A; Tr. 6].

Approximately three months later, Petitioner received a copy of the First Amended Charge, dated 29 May, 1963 [GCX 1c; R. 4]. Significantly the "refusal to bargain" allegations were dropped from this document, although allegations were added concerning alleged discriminatory discharges of employees Barwise and Olson.

III.
THE BOARD'S FINDINGS.

A. Original Decision and Order.

The Board's original Decision and Order adopted the decision of its Trial Examiner in its entirety [R. 71-72], thus affirming the following findings:

(1) Section 8(a)(1) Violation (Employee Rights).

Petitioner was found to have violated Section 8 (a)(1) of the Act for having discharged employee Barwise on account of his union or other protected activities on behalf of the Teamsters and for having "locked-out" its employees on 1 April, 1963, allegedly in order to force signing of the contract [R. 23]. The allegations that employee Olson was discriminatorily discharged were dismissed [R. 21; 71].

(2) Section 8(a)(2) Violations (Interference).

No evidence of any unlawful domination, assistance to or interference with the administration of the Independent Union was found prior to the events of late March and early April 1963. Indeed, the Board found no evidence of unlawful domination or assistance of the Independent Union at all.[11] Petitioner was, however, found guilty of unlawfully interfering *in the administration* of the Independent Union by "forcing it" to agree to a contract on 1 April, 1963, by engaging in a so-called "lock-out" [R. 22-3].

As a further element of this alleged violation, the Board found that Petitioner utilized the contract so obtained to bar the *subsequently asserted* Temasters' Petition and cites in this connection, Petitioner's conduct in forwarding to the Board, on behalf of the Union, a copy of the contract, as above described [R. 22-3].

(3) Section 8(a)(3) Violation (Discrimination).

The Board found that by its alleged unlawful discharge of employee Barwise and by its alleged unlawful "lock-out" of employees on 1 April, Petitioner violated Section 8(a)(3) of the Act. However, it absolved Petitioner of similar charges in the case of employee Olson [R. 21; 71].

---

[11]In this connection the Trial Examiner further found that, "although in late March, the Respondent (Petitioner herein) was aware that the employees were showing some interest in the Teamsters, no claim of representative status was made by that organization until April 2. Thus it appears that the Respondent was wholly free, at least until then, to deal with the Union and to reach whatever agreement with the Union that it could." [Tr. 21-2].

B. Supplemental Decision and Order.

Pursuant to the decision of this Court, in *NLRB v. Tonkin Corporation of California, etc.,* 352 F. 2d 509, issued on November 10, 1965, remanding the issues subsumed in the "lock-out" portions of the original Order to the Board for further consideration, in the light of *American Ship Building Co. v. NLRB,* 380 U.S. 300; the Board, without a further hearing, issued its Supplemental Decision and Order on May 27, 1967 [R. 81-6]. In this decision the Board came to the following conclusions:

(1) It adhered to its original decision that Petitioner "locked out" its employees to force acceptance of Petitioner's contract terms by the Independent Union and used this contract to obstruct the representation petition subsequently filed by the Teamsters, in violation of Section 8(a)(2) of the Act [R. 85].

(2) It found that Petitioner's "lock-out" was not protected by the *American Ship* decision, because Petitioner's use of this device was (a) "designed to destroy or frustrate the process of collective bargaining by preventing a free choice of a bargaining representative by the employees, and rendering the incumbent union incapable of effective and responsible representation;" and (b) "was also designed to encourage membership in the incumbent Union and discourage membership in the Teamsters." [R. 85]. Thus, it found the "lock-out" violated not only Section 8(a)(2) but also Section 8(a)(1) and (3) [Tr. 85].

IV.
PETITIONER'S POINTS AND ORDER OF ARGUMENT

Petitioner will demonstrate that the foregoing findings are not supported by substantial, credible evidence and that the so-called "lock-out", even if it be conceded as such, was a legitimate and lawful exercise of economic pressure by Petitioner brought to bear in support of its good faith bargaining position for the purpose of securing, not frustrating, agreement.

Petitioner will address itself initially to this Court's scope of review in weighing the evidence relied upon by the Board to support the above findings, emphasizing that the Court must view with caution the Board's total reliance upon isolated portions of the testimony of but a few of the numerous witnesses called by the General Counsel and its uniform disregard of the witnesses and evidence presented by Petitioner.

Next Petitioner will center its argument on the interference charge, including the "lock-out" issue. In this connection Petitioner will show that, despite the Board's contrary finding, oral agreement was reached on the terms of the contract and that Petitioner engaged in no "lock-out" as that term is traditionally defined, but rather, acted merely in compliance with the Union's request that a meeting be held to formally ratify that agreement.

Lastly, Petitioner will assume *arguendo* that a "lock-out" existed, but demonstrate that such activity is protected by the United States Supreme Court decision in *American Ship* and the Act itself. Here discussion will center on the Board's supplemental findings which will be seen, upon analysis, to have no substantial support in the record.

V.

APPLICABLE STANDARDS OF REVIEW.

The Board's Decision Cannot Be Sustained Unless It Is Supported by Substantial Credible Evidence. Moreover, as the Board Has Uniformly Credited Witnesses for the General Counsel and Discredited Those of Petitioner, It Becomes the Duty of This Court to Scrutinize All the More Closely the Findings Relied Upon to Support the Decision.

The Board's Supplemental Decision, even more so than the original, rests almost totally on the credit accorded to certain of the General Counsel's witnesses only, principally Hill and Barwise, and then only to certain portions of their testimony. On the other hand, testimony of the General Counsel's five other witnesses and of the witnesses called by Petitioner has been almost wholly disbelieved. Indeed, the critical testimony of four disinterested employees, called by Petitioner, has gone completely unremarked.

Under such circumstances the reviewing court, which is charged with the responsibility for assuring the reasonableness and fairness of the Board's decisions, is not restricted to a determination of whether there is any credible evidence in the record to support the Board's conclusion, but rather, is authorized to look at the record as a whole in order to determine whether the decision is supported by substantial credible evidence. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1951). In the performance of this function the reviewing court must take into account contrary evidence or evidence from

which conflicting inferences could be drawn, including evidence which fairly detracts from the weight of the evidence relied upon to support the decision [340 U.S. 487-488; *NLRB v. Isis Plumbing & Heating,* 322 F. 2d 913 (9th Cir. 1963)].

When the record discloses that the Board, or its Trial Examiner, has, in reaching its conclusion uniformly believed all of the General Counsel's witnesses and discredited those appearing for the Petitioner, the usual presumption in support of such findings will not be indulged, and the circumstance will be taken as some evidence of bias. In such situations, it becomes necessary to question more searchingly the inferences drawn from the evidence so credited and to consider all material contradictory evidence. *NLRB v. Miami Coca-Cola,* 222 F. 2d 341, 343 (5th Cir. 1955); *NLRB v. Florida Citrus,* 288 F. 2d 630, 636-7 (5th Cir. 1961); *NLRB v. United Brass Works,* 287 F. 2d 689, 691 (4th Cir. 1961); *NLRB v. Walton,* 286 F. 2d 16, 21 (5th Cir. 1961); *NLRB v. McGohey,* 233 F. 2d 406 (5th Cir. 1956).

Even beyond this, on the question of whether agreement was reached on the evening on Friday, 29 March, 1963, and in connection with the issue of the so-called "lock-out", even those plentiful aspects of the *General Counsel's* evidence which give support to the contentions of Petitioner have been ignored, as we point out below. Under these circumstances, Petitioner contends that the rule of the above cited cases is *a fortiori* applicable and that the Board's findings are not to be accorded their customary weight, but must, on the contrary, be viewed with caution.

VI.
ARGUMENT.

The Board's Finding That the Parties Failed to Reach Agreement on a Collective Bargaining Contract Is Not Supported by Substantial, Credible Evidence. On the Contrary, the Record Indicates That Petitioner Fulfilled Its Statutory Obligations by Recognizing the Independent Union and Bargaining Lawfully and Effectively to Agreement, and No More.

The Board, following its Trial Examiner's recommendation, initially concluded that no agreement was reached on the evening of Friday 29 March, 1963[12] [R. 22]. This was perhaps understandable in a certain sense, since the conclusion is fundamental to the Board's finding of unlawful conduct based on Petitioner's subsequent activities, as the decision impliedly concedes. For, if, in fact, agreement had been reached on the 29th, nothing in Petitioner's subsequent conduct could be so stigmatized. What is important, however, is the fact that the Board's conclusion flies in the face of uncontradicted evidence from all sides, including that given by several of the General Counsel's own strongest witnesses.

This same evidence indicates that the agreement so reached represented substantial concessions on the part of Petitioner's management, including: a two-step wage

---

[12]The Board appears to retreat from this position in its Supplemental Decision, discarding this flat assertion in favor of the more equivocal statement that, "The Tonkin brothers offered to match any higher rate paid by the local Pepsi-Cola Bottling concern. The employees present expressed satisfaction with this point and the meeting broke up." [R. 83].

raise; agreement that any further increase in the local beverage industry's wage scale would be matched by Petitioner; granting of time and one-half for overtime; oral concessions on the issue of paid holidays; oral concessions on the issue of sick leave; agreement that the driver-salesman bonus system would be reexamined and reorganized on a more favorable basis (which it was), and agreement to consider the establishment of an employee pension plan and to boost the Company's contribution to health and welfare plan as soon as Petitioner was financially able.

Moreover, many of these points were conceded at the final stage of negotiations—certainly the best evidence of genuine give and take in the bargaining. This, of course, demonstrates the effective power of the Independent and is quite inconsistent with the Board's suggestion that the Independent was a weak and subservient organization. The concessions won clearly evidence the fact that good faith bargaining had taken place, even though the Board's original and supplemental decisions make no reference to it. Indeed, the Board concedes the effectiveness of the representation of the Independent by its affirmative finding that Petitioner was not guilty of any assistance to or domination of the Union before the events of 29 March—1 April [R. 21]. From Petitioner's standpoint, then, it was dealing with the freely chosen representative of a majority of its employees, a representative which Petitioner had been obligated to recognize and deal with for several years. Moreover, as will be pointed out in greater detail below, Petitioner would have been

guilty of an unlawful refusal to bargain had it not recognized the Independent.

There is really no dispute in the testimony that the extended negotiations previously detailed culminated in agreement on the evening of 29 March, 1963. This fact is of vital importance, for when established, it wipes out the base premise of the reasoning which supports the Board's conclusion. Therefore, a review of the record is appropriate to demonstrate just how firmly it was established.

The starting point regarding the agreement reached on 29 March was Harry Tonkin's address to employees that evening, in which he offered the concession of paying time and one-half for overtime to the plant and production employees and further volunteered a two-step wage raise of $3.00 each year, and in addition to the offered raise agreed to match any further increase paid by the local soft drink industry [Tr. 255-60; 295-6].

Following Tonkin's remarks, the Union membership held its own meeting at which a consensus developed, the gist of which was that the employees *authorized* their Negotiating Committee to accept Petitioner's offer on the condition that it would confirm its agreement to match any further raise given by the industry locally. In addition, the Committee was asked to discuss concessions regarding sick leave and paid holidays, but failure to reach agreement on these latter points was not to invalidate the membership's authorized acceptance of terms. Every rank-and-file

employee testifying at the hearing confirmed the fact that consensus was reached on this basis.[13]

---

[13]The Board has, throughout this case, totally ignored the testimony of these disinterested witnesses to the effect that the membership instructed the Committee to accept the Tonkins' offer. James Huleva, a route salesman, described the Union meeting that evening:

> "Q. After the Tonkins had left, yes. A. Well, it was more or less agreed, the way I understood it—Q. Was there a discussion among the men there? A. Yes, there was. Q. And were most of the route salesmen there? A. I would say most of them. Some of the plant crew had left, but most of the men were there. Q. Then continue right on. What was said by whom? A. Well, it was more or less agreed at that time, it seemed like to me that we would go along with the agreement with the Tonkins, the way it was set up that we would sign the contract. Q. And was there some agreement or understanding among the men regarding or asking the Tonkins if they would match any increase of any other beverage company in the area? A. They said that they would, yes. Mr. Kintz: I think it is a conclusion as to the statements he made concerning the understanding among the men. The Witness: Well, the Tonkins said if there was any, if the other companies gave, if there was more money, they would match the money. Q. (By Mr. Jackson) Now, did the men, following this, ask the Negotiating Committee to convey this to the Tonkins? A. Yes they did." [Tr. 334-5].

This testimony was corroborated in every respect by that of Challas Jensen:

> "Q. Did you attend the meetings that took place on the 29th of March, Friday evening? A. Friday evening, yes, I was there. Q. Were you present at that meeting after the Tonkins left the meeting and the other employees met together there to decide on the matter of a contract offer? A. Yes. Q. And did you participate in the discussion about what to accept and so forth? A. Yes. Q. And what was your understanding concerning the general agreement among the men on that point at that time? A. Well, when we talked it all out, the way I understood, when I went home, that it was all settled that we would accept the Tonkins' offer and we were going to see if we couldn't get our birthday off, which we did, we were going to ask for our birthdays off or one paid holiday a year. I can't remember just how that was, which I understand was all accepted. Q. Was the point that Mr.

(This footnote is continued on the next page)

Just as importantly the testimony of the Union's membership was fully corroborated by three of the

---

Huleva mentioned regarding the Company's matching any other increase by Pepsi or anybody else in the local bottling industry a part of that general understanding? A. Yes, uh-huh. Q. And over the weekend Mr.—oh, withdraw that. And then were some members of the group there authorized to convey this decision to the Tonkins? A. Yes, I don't remember this for sure who went over. I think there were two of them went over at the plant to tell the Tonkins that we accepted." [Tr. 340-1].

The third of these witnesses, Roy Fletcher, testified in identical fashion:

"Q. On the 29th of March. And directing your attention to the time after the Tonkins left the meeting, were you present at the discussion among the employees there about the contract which followed their departure? A. I was there for awhile. I left before everybody else did. Q. In other words, you weren't the last to leave? A. No, I wasn't the last. Q. But you were there for awhile. Will you describe in your own words—withdraw that. Did you take part in the discussion that they described about whether to accept the contract terms or not? A. Yes, sir. Q. Now, will you describe in your own words just what occurred then and what was said by whom and so forth as best you remember it? Again if you can't remember the exact words, just tell us the substance of what was said. A. Well, I just—like the gentleman said, I figured that the contract was settled that—what I mean, that we were going to match whatever the other bottler companies what any of the companies were going to give and—Q. And—A. I figured everything was settled, we were going to go back Monday morning to work. Q. And was there something said about asking the Tonkins that evening to add birthdays as a paid holiday? A. We would like to have one day paid, one day off. Q. Was anything discussed about sick leave at this time, if you recall? A. I think something was brought up. I don't know if anything was really decided on. Q. And did the group there authorize some of the members to go to the Tonkins and communicate this decision to them? A. Well, before the, I had what I thought was settled that we were going to —that the contract, you know, was going to be signed, everything else, I was in a hurry to get home, because I had something important to do, so I left. Q. Well, when you thought that matter was settled, you understood so far from the rest of the men there, you left? A. Yes, I figured it was all settled." [Tr. 350-1].

General Counsel's key witnesses, Olson, Hill and Williams.[14]

---

[14]Donald Olson, one of the original complainants, testified as follows:

> "Q. And following this meeting on Friday evening there, do you recall—I am talking about the meeting of the men that took place after the Tonkins had left the Hall? A. Yes. Q. Do you recall there being some discussion about, among the drivers there about being willing to go along with whatever the rest of the bottling industry paid? A. Yes. Q. And that was the sense, or the decision that was communicated to the Tonkins at the Seven-Up office later that evening, wasn't it? A. Yes. Q. In addition to the points that were mentioned on the sick leave? A. Yes. Q. And was there a point brought up also about another paid holiday? A. Yes." [Tr. 178].

Olson went on to specifically confirm that the Tonkins at the same meeting, agreed to all of the points and conditions specified by the Negotiating Committee:

> "Q. And when you came over to the office later that night, then the union stated its position as to what they wanted, isn't that correct, after the meeting? A. Yes. We stated what we wanted, yes. Q. And actually at that meeting at the office they agreed to go along with just about all the points you specified, didn't they? A. Yes." [Tr. 183].

Howard Hill, the Union's President, and one of the General Counsel's principal witnesses, testified candidly:

> "Q. Would you describe it in your own words to us just as it took place there? A. I tried to keep the fellows there to have this vote, and two or three of the plant fellows well, one of them this wife was outside in the car, so he walked out, another walked out, we tried to hold them together, we could only keep about two of the plant men and the rest of the drivers. We started talking about the proposals offered by management, and what our alternatives were. Well, we didn't get to take an actual vote at that meeting. We tried to, but we didn't get to it, but we came to an oral understanding agreement with the fellows that what the industry would offer, we would accept in the same vein, and that's when the group of us went down to the office afterwards. Q. And it was that understanding that you reported to the Tonkins when you met with them at the office later? A. Right. A. Now, as I understand it, at that meeting there at the office, you said that it had been agreed that they would go along with what the industry paid, and there were these

(This footnote is continued on the next page)

Even the General Counsel's star witness, Barwise, reluctantly concedes the fact that an agreement had been reached despite some attempt by him to evade the issue [Tr. 23-5; 61-3].

It cannot be seriously contended otherwise on this record, but that the membership unequivocally authorized its Negotiating Committee to accept Petitioner's offer that same Friday evening, subject to the proviso concerning the matching of any other increase in the industry plus, if possible, additional concessions on the issues on the issues of paid holidays and sick leave.

---

one or two other remaining points that you wanted to agree with them at that time, one was the question of sick leave. A. Yes." [Tr. 99-100].

Bernal Williams, yet another of the General Counsel's witnesses, supplied further corroboration that a decision had been reached:

"Q. (By Mr. Jackson): Mr. Williams, on the Friday evening after the Tonkins had left and you were holding the Union meeting, I believe Mr. Barwise testified that the production employees indicated that they were happy and that most of them drifted away from the meeting? A. Yes, they walked out, yes. Q. And that the matter was discussed a little further among the drivers, salesmen, driver-salesmen who remained there and they more or less informally decided that they would accept what was being paid wholly in the bottling industry, is that correct? A. Whatever the industry would pay, however, they went, yes. Q. And then the group of you that Mr. Barwise described, went over to the Tonkins' office there at 7-Up and communicated this decision to them? A. We told them, yes. Q. And was there somebody, was there something said in the course of that meeting there at 7-Up about what Pepsi was offering and what the situation was at Pepsi, do you recall? A. Yes. When we told them we would go with the rest of the industry, the way the rest of the industry went, that it would be all right with us, and then Mr. Tonkin told me that he would find out what Pepsi was going to do and then he would phone me at a later date that evening, which he did." [Tr. 82-3].

The evidence is equally clear and equally without substantial dispute that the meeting between the Negotiating Committee and the Tonkins held later that same evening secured Petitioner's agreement on the main points, its concessions on the other two, and in addition, concessions in other areas (such as the bonus system), not even mentioned by the membership and beyond their mandate to the Negotiating Committee, and that agreement was concluded on that basis. That agreement in substance was reached, is the inescapable conclusion from all of the evidence concerning this event. Certainly there was no misunderstanding among the rank-and-file of the membership who believed that the matter had been concluded and were surprised, on the following Monday morning, to learn from their own officers that it apparently had not.[15]

The problems which developed on Monday morning were just as surprising to the Tonkins who were given the clear impression by the Negotiating Committee that an agreement had been concluded. As Millard Tonkin put it,

> "We had shaken the hands of the men and we looked at them and we were happy that they had reached the conclusion that they did, and it was our feeling when we left that there was a satisfactory agreement and it was a formality that Monday morning we were ready to go to work under the terms of the new contract." [Tr. 298].

---

[15]See, in this connection, the testimony of Huleva [Tr. 337-8]; Jensen [Tr. 342-4]; Kaderly [Tr. 347] and Fletcher [Tr. 350-2].

Even Hill and Barwise were forced to admit the fact that the membership's conditions for contract acceptance were obtained.[16] Of course, this testimony was grudging at best, for the obvious reason that the fact of prior agreement throws an embarrassing light upon their own subsequent conduct, which can only be interpreted as a deliberate effort to frustrate the agreement on which they there shook hands.

The foregoing review of the evidence, it is submitted, establishes beyond any doubt that agreement was reached on Friday evening. It follows, therefore, that as the Board's contrary finding is not supported by substantial credible evidence in the record, it must be overturned. *Universal Camera Corp. supra.*

A. The Formality of Ratification, Insisted Upon by the Union's Officers, Was a Subterfuge to Avoid Execution of the Bargain Reached.

At the conclusion of the meeting between the Tonkins and the Negotiating Committee on Friday evening, it was understood that an agreement had been consummated subject only to the formal ratification of the membership on Monday morning. The subject of ratification was initiated by Hill who stated to the Tonkins that the Committee did not have the authority to execute the agreement without taking another vote of the membership[17] [Tr. 101-02].

---

[16]See testimony of Barwise [Tr. 25-6; 61-7] and Hill [Tr. 100-02; 106-09].

[17]This statement did not jibe at all with the understanding of the rank-and-file employees, who uniformly testified that the committee had been authorized to enter an agreement if their terms were met, and believed matters had been settled

Such ratification was purportedly required by the Union's By-Laws [Tr. 100-02]. It now appears that the officers' insistence on this additional step stemmed not from their concern over compliance with Union procedures, but rather was a manifestation of their intention to repudiate the agreement reached and to frustrate the bargaining process. For over the intervening weekend, officers Hill, Barwise and Williams were approached by the Teamsters Union and began solicitation on its behalf among the Independent's membership in an effort to subvert this agreement. The bad faith which this activity evidences is, of course, attributable only to the Teamsters and the Independent's officers, not the membership, since the latter, despite some initial confusion, early evidenced its desire on Monday to stick with the Independent and the bargain it had made.

B. The Occurrences of 1 April, and the So-Called "Lock-Out."

Once it is understood that an agreement had been reached on Friday evening, the Board's finding that on Monday 1 April, "Respondent locked out its employees to force immediate acceptance of *Respondent's* new contract terms . . .", [R. 85] is seen to be without substance. Let us consider this so-called "lock-out". As indicated above, on Friday evening following their meeting at Petitioner's office, the Union's officers

---

Friday without the necessity of any further steps being taken (See footnotes 13 and 15 *infra*). Moreover, there is no evidence that in the Union's meeting on Friday evening anything was said about a subsequent vote to formally ratify the agreement.

stated that they would meet with the membership before work on Monday for the purpose of taking a vote to ratify the agreement reached [Tr. 102; 182-3; 285; 299].

It was assumed by all that this would be a mere formality, but since notice might not have reached all of the employees over the weekend and there was a possibility that some of the route salesmen might set out on their routes before learning of the meeting, Petitioner kept the lock on the gate of the truck parking lot enclosure across the street from the plant on the early morning of 1 April. The plant itself was open and otherwise completely normal in this respect [Tr. 300-01; 265-6].

These, presumably, are the circumstances relied upon to establish the "illegal lock-out". Their mere recital, viewed in any reasonable light, reveals the absurdity of this charge. It seems quite clear that none of the employees themselves, other than the most interested of the complainants so viewed it [Tr. 344-5; 347; 351-2]. Certainly the traditional conception of a "lock out", as "the cessation by the employer of the furnishing of work to employees in an effort to obtain for the employer more desirable terms"[18] is not applicable to this situation. Petitioner had no intention of locking its truck gate for the purpose of bringing pressure to bear on employees to reach agreement: *it honestly believed that agreement had already been reached.* The locked gate was to insure attendance at the meeting

---

[18]*Re Associated General Contractors, Georgia Branch,* 138 NLRB 1432 (1962)

which Union officers themselves had called, in an attempt to expedite formalization of the contract.

The incidents which followed on that morning are consistent only with the sequence of events previously recited. As indicated, the Tonkins were understandably surprised and no little dismayed to find the Union's officers attempting to repudiate the agreement on which they had shaken hands two days earlier and evidently exhorting the membership to reject it. Under these circumstances, the Tonkins stressed their legitimate concern for assuring that the Union live up to the contract it had agreed to in precisely the same manner that it would demand and expect of Petitioner, nothing more.

During the various meetings held that morning, management was firm in insisting that the Union honor its bargain and execute the agreement.

Unquestionably, the Tonkins were entitled under the law to make just such a demand, for in order to avoid misunderstandings and to supply an accurate record upon which future negotiations can be based, the duty to "bargain collectively" imposed by the Act expressly contemplates the execution of a written contract if agreement on its terms is reached and either party requests the same.[19]

---

[19]Section 8(d) of the Act defines "collective bargaining" as,

> ". . . the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and *the execution of a written contract incorporating any agreement reached if requested by either party* . . ." (emphasis added)

Significantly, *none* of the rank-and-file employees were subpoenaed by the General Counsel to testify on this point. The reason is evident. Those of them who were called by Petitioner made it crystal clear that the membership, while somewhat confused at first by the tactics of their own officers on Monday morning, eventually saw through these and insisted on sticking by the terms of the contract agreed to. Execution of the contract only put a formal seal on the prior agreement and represented a "capitulation", not on the part of the Union or its membership, but on the part of the Union's officers and the Teamsters in their attempts to frustrate agreement.

Indeed, the officers of the Independent could not have lawfully acted otherwise. Under decisions of both the Courts and the Board, a refusal by the Union's officers to execute the subject agreement would have exposed the Independent Union to charges of refusal to bargain collectively with Petitioner in violation of Sections 8(b)(1) and (3) of the Act.[20]

And while it is purely an internal Union affair as to whether negotiators can execute an agreement on behalf of their Union or must submit the agreement reached to ratification of the membership, *NLRB v. Darlington Veneer Co.,* 236 F. 2d 85, 88 (4th Cir. 1956); *Allis Chalmers Mfg. Co. v. NLRB,* 213 F. 2d 374 (7th Cir. 1954), if a union, in bad faith, delays submission of a negotiated agreement so as to de-

---

[20]See *Standard Oil Co. v. NLRB,* 322 F. 2d 40 (6th Cir. 1963); *NLRB v. Painters Union,* 334 F. 2d 729 (7th Cir. 1964); *Butchers Union Local 120, etc.,* 154 NLRB 16 (1965).

feat approval, or refuses to ratify an agreement for some extrinsic or unrelated reason, it is guilty of refusal to bargain.

Thus, in *Los Angeles Mailers Union No. 9, etc.,* 155 NLRB 684, 689 (1965) the Board's Trial Examiner made this pertinent observation:

> "It is commonly understood that a principal may authorize his agent to negotiate and make a collective-bargaining contract or he may limit the agent's authority to negotiating and recommending a collective-bargaining contract. If the agent's authority is so limited, normally a contract does not exist unless the principal approves the recommended agreement. Where past dealings have demonstrated that negotiators' recommendations carry considerable weight and are usually accepted in due course, it is readily understandable that the negotiators for both sides, and even the principals, would come to regard acceptance or ratification by the principal as a formality only; and a rejection by the principal in such a case might well be deemed an act of bad faith, especially in the absence of a bona fide reason for dissatisfaction with the substantive provisions of the negotiated terms of the contract."[21]

Here the reasons for the Independent Union's initial failure to ratify the agreement had no relationship to the substantive provisions of the negotiated contract. Even the Board concedes, as it must, that the Union's

---

[21]See *H. J. Heinz Company v. NLRB,* 311 U.S. 514, 526, 61 S. Ct. 320, 85 L. Ed. 309 (1941). *Sheet Metal Workers Union, Local No. 65 AFL-CIO,* 120 NLRB 1678 (1958); *Operating Engineers Local Union No. 3,* 123 NLRB 922, 929 (1959).

refusal was motivated by the defection of its officers to the Teamsters Union [R. 83-84]. Therefore, the Union's refusal to reduce the contract to writing cannot be defended on any legitimate ground and the propriety of Petitioner's insistence on the same is clearly established.

The Board's findings in the instant case are pinned to certain basic factual assumptions and must stand or fall with them: (a) that no agreement was reached at any time; (b) that the Petitioner insisted on its contract or nothing at all, and (c) that this contract was eventually attained by allegedly illegal means. As we have seen, these findings are not supported by substantial evidence.

The Board has totally ignored the many concessions made by Petitioner, the agreement actually reached on the preceding Friday evening and the understanding of the membership in this respect. It completely sidesteps the significance of the activity engaged in by Hill, Barwise and Williams on Sunday by refusing to relate their Teamster contacts on that date to what took place the following Monday morning. However, the great weight of evidence disposes of these assumptions and the Board's findings fall with them.

Assuming, for the Sake of Argument, That Petitioner "Locked-Out" Its Employees, Such Activity Was Solely in Support of Its Legitimate Bargaining Position and Undertaken in Good Faith. Consequently, the "Lock-Out" Is Protected by the American Ship Decision of the United States Supreme Court.

Even if it is assumed, *arguendo,* that the leaving of the lock on the gate of the parking lot enclosure after the employees failed to ratify the agreement amounted to a "lock-out", there was nothing illegal or

unlawful about it, for it was patently nothing more than a legitimate exercise of economic pressure on the part of Petitioner in support of its bargaining position and as such, within the ambit of the United States Supreme Court's decision in *American Ship, supra.*

The Board has found that Petitioner's activities are not so protected because the "objects" of the "lockout" made it "the very antithesis of one solely in support of a legitimate bargaining position." [R. 85-86]. This conclusion has been reached principally by the technique of seizing upon *dicta* in *American Ship,* wrenching it out of context, and applying it in stigmatizing Petitioner's motives. We shall endeavor to analyze separately each of the findings on this issue in order to demonstrate that the Board has without exception reached untenable, insupportable conclusions.

A. The Board's Original Finding, Here Reaffirmed, of Unlawful Interference With the Independent Union, Is Insupportable as a Matter of Law.

After it had, presumably, reconsidered the "lockout" issues, the Board adhered to its original finding, "that the Respondent locked out its employees to force immediate acceptance of *Respondent's* new contract terms by the incumbent . . . Union, and then used this new contract to obstruct the representation petition filed by the rival Teamsters with the Board, all for the purpose of keeping the incumbent Union subservient to it as a bargaining representative and preventing the rival Teamsters from becoming the bargaining representative", in violation of Section 8(a)(2) of the Act [R. 85].

Let us first examine the Board's charge that Petitioner "forced acceptance of *its* contract". In dealing with this finding, Petitioner must also assume, *arguendo,* that no agreement was reached prior to Monday,

1 April. Otherwise, Petitioner could hardly be said to have "forced acceptance" of a contract which was already agreed to. However, if we accept the Board's view, the situation when the employees reported for work that day can only be characterized as an impasse. According to the Board, the parties had not resolved any of the differences between them on the central issues in negotiation, and neither side was willing to allow a concession or negotiation on the other's terms—this, even after numerous meetings and discussions.[22]

In just such a situation, an employer is entitled to utilize economic pressure in the specific form of a lock out for the express purpose of "forcing" agreement on its terms. *American Ship, supra.* The question before the Court in that case was stated as follows:

> ". . . whether an employer commits an unfair labor practice . . . when he temporarily lays off or 'locks out' his employees during a labor dispute to bring economic pressure in support of his bargaining position." (380 U.S. at pp. 301-2).

The Court's holding on this point was that no violation occurs, "when, after a bargaining impasse has been reached [the employer], temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." (380 U.S. at page 318).

---

[22]Under remarkably similar circumstances the Trial Examiner and the Board in *American Ship* found impasse to have been reached. (*Id.* at pp. 302, 305.) See also *Taft Broadcasting Co.,* 163 NLRB No. 55 (1967).

Thus, even if Petitioner's motive for the lock out were "forcing acceptance of its contract", there can be no question but that such activity is now fully protected.[23]

Manifestly, there is nothing more presented by the evidence in this case than a situation falling squarely within the intendment of the above holding. Even conceding that the Tonkins actually locked-out their employees, this conduct was clearly directed towards securing agreement on the most favorable possible terms. The vice with which they are here "charged" is having done just exactly that. That is to say with having utilized the lock-out to "force" the Independent into signing a contract.

We next turn to a consideration of the second portion of the Board's finding, that Petitioner "then used this new contract to obstruct the representation petition filed by the rival Teamsters with the Board, . . . and preventing the rival Teamsters from becoming the bargaining representative." [R. 85].

This finding constitutes a patent attempt by the Board to bootstrap its decision by imputing to Petitioner an *animus* toward the Teamsters Union which would render Petitioner's "lock-out" unlawful. The difficulty here is that Petitioner's recognition and dealings with the Independent Union, as well as its subsequent assertion of the new contract as a bar to the

---

[23]And under Petitioner's view that agreement had been previously reached, its lock out to force *execution* of the contract is equally permissible. If *American Ship* permits the employer to lock out in order to pressure the union into accepting its proposals, a lock out to force the Union to sign a contract already agreed to, pursuant to Section 8(d) of the Act, presents *a fortiori* case.

Teamsters petition, were all perfectly within the law and the Board's contrary finding is diametrically opposed to its own prior decisions.

First of all, it should be recalled that Barwise testified that his *first contact* with the Teamsters and the first attempts to solicit authorizations on their behalf did not take place until Sunday, 31 March, 1963. (And there was no evidence that any other employee had previously met with that union.)[24] Therefore, on any view of the evidence, Petitioner's management could have had no actual knowledge of this whatever until the fact was volunteered by Barwise after the contract had been signed on 1 April [Tr. 36; 270-1].[25]

No claim of representation was made by the Teamsters until Tuesday, 2 April, when its Petition was filed and this did not come to Petitioner's attention until at least the 4th or 5th when a copy was received in the mail. The so-called "lock-out", therefore antedated not only the Teamsters petition, but the events which called it to Petitioner's notice.[26]

---

[24]The opinion of this Court in the original case, *NLRB v. Tonkin Corporation, etc.,* was, therefore, mistaken when it declared: "The record also discloses evidence of side-line proselytizing efforts on the part of the Teamsters' Union, which were intimately interlaced with . . . the earlier company—union contract negotiations." (352 F. 2d 509, 510-11).

[25]Harry Tonkin did comment on Friday evening that he had "heard reports" of Teamster solicitation efforts [Tr. 271]. These "reports" were apparently erroneous. But even assuming Tonkin was "aware" of Teamster interest or activity, albeit mistakenly, he could not know its *extent.* And Tonkin was not required to assume that the Teamsters had majority support; on the contrary, he would have been forbidden by law to act on mere surmise. Until presented with concrete evidence, he was duty bound to negotiate with the Independent Union.

[26]Certain of the testimony indicates that the Teamsters may have succeeded, on 1 April, in obtaining signatures of a ma-

Not only would it be grossly unfair to penalize Petitioner for utilizing legitimate economic pressure *vis-a-vis* the acknowledged representative of its employees, merely because this might have an incidental adverse affect upon the *subsequently asserted* claim of a rival union to representation, but such a penalty also contravenes the Board's own decisions.

The Board has, in similar situations involving competing unions, ruled that an employer is free to deal with the union representing the majority of its employees, even though it may be aware of the organizing activity of a second union. And a contract executed betweeen the employer and the majority union will, in such a situation, if effective immediately or retroactively, bar a petition filed by a rival Union assuming the employer has not been informed at the time of execution that such a petition has been filed. *Deluxe Metal Furniture Company,* 121 NLRB 995, 999 (1958).[27] As the Teamsters' petition in the case at bar concededly was not filed until the day following execution of the agreement, Petitioner was perfectly within its rights to assert the contract as a bar to that petition.

---

jority of employees on authorization cards [Tr. 28-9]. However, this "fact" did not come to Petitioner's attention until the hearing held before the Trial Examiner, and the Teamsters never did make a demand for recognition based on the cards allegedly obtained.

[27]Ironically enough, the Board's Trial Examiner followed this rule in the case at bar. He found that, "Although in late March, the Respondent [Petitioner herein] was aware that the employees were showing some interest in the Teamsters, no claim of representative status was made by that organization until April 2. Thus it appears that the Respondent was wholly free, at least until then, to deal with the Union and to reach whatever agreement with the Union that it could." [R. 21-2].

Indeed, every time an employer asserts a contract as a bar to a representation petition he is "obstructing" that petition and "preventing the rival union from becoming the bargaining representative", to use the Board's characterization. Yet the Board's rule, as enunciated in *Deluxe Metal, supra,* allows an employer, in the interest of stable labor relations to negotiate freely with a majority union, enter an agreement, and assert that agreement as a bar without fear that such activity will be turned against it in the form of an unfair labor practice charge.

Nevertheless, this latter is precisely what the Board seeks to do in the instant case. Surely if an employer may deal with a majority union and reach agreement, even in the face of rival union activity, prior to the filing of a petition, it may use all the economic weapons at its disposal, including a lock out, to reach agreement with that union. Under the Board's holding in *this* case, an employer would be precluded from utilizing a lock-out, even though sanctioned by *American Ship,* where it was aware of rival union activity, for fear that it would be accused of "obstructing" that rival union's claim. Such a result is, of course, unfair and illogical, for it makes the employer's use of the lock-out depend on the presence or absence of a competing union, a circumstance wholly outside the employer's control.

To further illustrate the incongruity of the Board's position, if the Petitioner had, on 1 April 1963, refused to bargain with the Independent Union on the mere ground that it was "aware" of organizing activity on

behalf of the Teamsters, it would unquestionably have violated Section 8(a)(5) of the Act.[28] And it would have been no defense to such a charge that Petitioner's employees subsequently signed authorization cards on behalf of a rival union. In fact, just such a defense has been rejected by this Court. *NLRB v. Kellogg's Inc.,* 347 F. 2d 219 (9th Cir. 1965); *Snow v. NLRB,* 308 F. 2d 687 (9th Cir. 1962). In *Snow* this Court declared, "The fact as to whether an employer entertained a genuine doubt that a union represents a majority of the employees is to be determined as of the time the employer refused to recognize the union. Once it is shown that the employer entertained no genuine doubt of this kind at the time it refused to bargain, an unfair labor practice has been established. The fact that, as it later developed, there were grounds which might have created a genuine doubt at that time is immaterial."

Thus, on the present posture of this case, Petitioner is damned if it does and damned if it doesn't. Dealing with the Independent Union subjects it to charges of "interference", while refusal to deal with the Independent subjects it to charges of "refusal to bargain". Petitioner submits that it chose the proper course in resolving this dilemma, by continuing to deal and to negotiate with the Independent Union which was the true representative of its employees during the critical time.

The final portion of the Board's original conclusion is that the Petitioner's "lock-out" was conducted "For the

---

[28]Petitioner was in fact accused of such a violation in the Independent's original Charge [GCX la; R. 3].

purpose of keeping the incumbent union subservient to it as a bargaining representative." [R. 85]. We have previously pointed out that there is no evidence in the record nor any finding that the Independent Union was ever subservient *in the first instance.* The facts show the Independent Union to have been an adroit and resourceful representative of its membership and one completely free of any domination or control on the part of Petitioner. Thus, there is no warrant for any inference that the Independent was subservient or easily manipulated. The evidence indicates that it was a labor organization in every sense of the word toward which Petitioner was obligated to conduct itself in accordance with its statutory and contractual obligations.

B. It Was Not Petitioner's Use of the "Lock-Out" Which "Frustrated the Process of Collective Bargaining" or "Rendered the Incumbent Union Incapable of Effective Representation;" Rather, Any Such Consequences Were Attributable to Teamster Interference and the Desertion of the Independent by its Own Leadership.

The Board's finding that this Petitioner "frustrated the process of collective bargaining" [R. 85] is intentionally couched in the wording of the majority opinion in *American Ship,*[29] in an effort to distinguish the case at bar. But the language alluded to affords the Board no solace. On the contrary, it is evident that Petitioner

[29]Thus, speaking for the majority, Mr. Justice Stewart noted: "There was no evidence and no finding that the employer was hostile to its employees banding together for collective bargaining or that the lock-out was designed to discipline them for doing so. It is therefore inaccurate to say that the employer's intention was to destroy or frustrate the process of collective bargaining." (380 U.S. at 309).

was agreeable to bargaining with its employees through the Independent Union as their majority representative, even going to the extent of engaging in a "lock-out", says the Board, to secure acceptance by that Union of its contract terms. Suffice it to say that this was precisely the intention and motive of the Petitioner in the *American Ship* case.

In point of fact, if anyone was guilty of "destroying" or "frustrating" the collective bargaining process, it was the Union's own officers, aided and abetted by the Teamsters, who admittedly set forth, in blatant breach of their fiduciary obligations to the membership, to create a claim on behalf of that rival union and thereby void the agreement previously negotiated. Hill and Barwise, the Independent Union's President and Secretary-Treasurer, respectively, admitted quite candidly to signing Teamster authorization cards on the day before the agreement was to be submitted for employee ratification. Moreover, additional signatures were solicted during the Independent's own meeting the following morning.[30]

The Teamster orientation of the Union's officers readily explains the confusion and reversal of form evidenced on Monday morning. However, the attempt of the officers to subvert the agreement was quite apparently rejected by the membership, for otherwise Hill and Bar-

---

[30]William Barwise testified that the results of the vote taken on 1 April were 9 to 8 against ratification [Tr. 31; 33]. Barwise further testified that he secured nine signatures as of Monday morning on behalf of the Teamsters, including those of himself and Hill [Tr. 28-9]. It may be safely assumed, therefore, that the Union's officers not only voted *against* the pact they had previously agreed to, but that their vote also made the difference between majority approval and disapproval.

wise would never have agreed to sign the contract. Execution of the agreement, therefore, was not only a victory for Petitioner, but a victory for the rank-and-file of the Independent over its defecting officers.

We may be permitted to wonder how Petitioner's conduct might have been characterized had it repudiated its contractual obligations and made overtures to another Union, or had it attempted to evade them by transferring assets, relocating its plant, or some such similar device. Yet the conduct indulged in by the Independent's officers amounted to the counterpart of this precise sort of thing. The breach of trust committed by the Union officers here, is not a minor matter; these officers violated the provisions of Fderal law.[31]

The point is that the Board would punish Petitioner for fulfilling its obligations and abiding by its responsibilities by characterizing its conduct and the sum of its efforts at good faith negotiation and settlement as "unlawful interference".[32] On the other hand, incred-

---

[31]Section 501(a) of the Landrum-Griffin Act, 29 U.S.C. Section 501(a) provides in part: "The officers . . . of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, . . . *to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any manner connected with his duties* . . ." (Emphasis added). See also *Johnson v. Nelson,* 325 F. 2d 646 (8th Cir. 1963), in which the reviewing court said of this statute, "thus it plainly appears that the statute is broad in its reach. Officers and other union representatives may not act adversely to their organization or to the members as a group, or acquire a personal interest which is contrary to the interests of the organization. Being trustees the officers must subvert their own personal interests to the lawful mandates and orders of the organization." (At p. 650).

[32]That Petitioner's alleged "lock-out" cannot, *per se,* be said to have destroyed the Independent's capacity for effective representation is evident from the following excerpt from

ibly, the most flagrant breach of obligation and repudiation of responsibility on the part of the Independent's officers is being capitalized on and even rewarded.

In addition, the Board has seen fit to completely overlook the interference of the Teamsters Union in the affairs of the Independent. Unquestionably the Teamsters' belated claim to representation would have been unavailing had the Independent's officers ratified the agreement reached in substance on Friday. This is the reason for that Union's last-ditch effort, successful it seems, in suborning the defection of the Independent's officers.

It may well be inferred that there was wrongful interference in this case, but if the Independent was "incapable of effective and responsible representation" during the events in question, its lack of viability is attributable to the Teamsters, not this Petitioner.

C. The Board's Finding of an 8(a)(3) Violation Based on Petitioner's Purported "Lock-Out" to "Discourage" Teamster Membership Has No Support in Fact or Law.

As we have previously pointed out, the Board, in its Supplemental Decision, has taken great pains to attempt to distinguish the instant case from *American Ship* by drawing upon language in that opinion which was not necessary to the decision of the matter. Here the Board attributes to Petitioner the "proscribed pur-

---

American Ship: "Moreover, there is no indication, either as a general matter or in this specific case, that the lock-out will necessarily destroy the Union's capacity for effective and responsible representation. The unions here involved have vigorously represented the employees . . . and there is nothing to show that their ability to do so has been impaired by the lock-out" (380 U.S. at p. 309).

pose" of *encouraging* membership in the incumbent union and *discouraging* membership in the Teamsters [R. 85]. This finding, in turn, is based on the following language of American Ship: ". . . for that section, [8 (a) (3)], requires an intention to discourage union membership or otherwise discriminate against the union. There was not the slightest evidence, and there was no finding, that the employer was actuated by a desire to discourage membership in the union as distinguished from a desire to effect the outcome of the particular negotiations in which it was involved." (380 U.S. at 313).

Even a cursory reading of the above language indicates that the *American Ship* court was concerned with whether the lock-out was aimed at "discouraging" membership in the union *which had been locked out.* This is not the situation here. *American Ship* did not presume to deal with an employer's use of the lock-out in the context of rival union claims.[33] However, as we point out above, the Board itself has unequivocally held that an employer is free to deal with a majority union and to execute an agreement at any time before he is aware of a rival union's representation petition.[34]

There is no gainsaying that the Tonkins' primary motive was to bring about a settlement of the contract dispute on favorable terms. Quite naturally, the effect

---

[33]This Court, however, has previously considered such a case. In *NLRB v. Golden State Bottling Company, etc.,* 353 F. 2d 667 (9th Cir. 1965) the Court disposed of Board findings practically identical to those asserted here.

[34]*Deluxe Metal Furniture Company, supra; Portland Associated Mortician's Inc.,* 163 NLRB No. 76 (April 2, 1967).

of executing an agreement with the Independent Union was to "discourage" membership in the rival Teamsters. But this element is present in every case in which an employer refuses to deal with one union in favor of another. Under the instant facts, because the Teamsters' Petition was not timely, Petitioner's dealings with the Independent, including the "lock-out", were lawful, protected activities, the Board's characterization to the contrary notwithstanding.[35]

In further support of its finding the Board alludes to Harry Tonkin's statement on Friday evening, "That he did not want to negotiate with the Teamsters, that he wanted to continue to do business with the Union rather than the Teamsters." [R. 82]. We reiterate that there was nothing illegal in expressing a desire to negotiate with the majority representative of his employees. *Cf. Coronet Mfg. Co.,* 133 NLRB 641 (1960).

It must be remembered that at the time of Tonkin's alleged remarks no rival claim to representation had

---

[35]The majority in American Ship rejected a similar contention raised by the Board there in the following manner: "Similarly, it does not appear that the natural tendency of the lock-out is severely to discourage union membership while serving no significant employer interest. In fact, it is difficult to understand what tendency to discourage union membership or otherwise discriminate against union members was perceived by the Board. There is no claim that the employer locked out only union members, or locked out any employee simply because he was a union member; nor is it alleged that employer conditioned rehiring upon resignation from the union. It is true that the employees suffered economic disadvantage because of their union's insistence on demands unacceptable to the employer, but this is also true of many steps which an employer may take during a bargaining conflict and the existence of an arguable possibility that someone may feel himself discouraged in his union membership or discriminated against by reason of that membership cannot suffice to label them violations of §8(a)(3) absent some unlawful intention." (380 U.S. 312-13).

been asserted, nor had any action to this end been undertaken. On Friday evening, Tonkin stressed throughout his address that Petitioner's dealings with the Independent in the past had been harmonious and beneficial to both sides, and he cited this as one of the advantages to the employees of dealing through their own union. By way of comparison, merely, he adverted to some of the consequences which might flow from representation by a larger union with other affiliations, such as the Teamsters, which might embroil the men in disputes not of their own making [Tr. 255-60; 271-3; 295-6].

Tonkin was careful not to suggest anything which might be inferred as infringing on the employees free choice of a representative. In fact, he prefaced his comments by emphasizing that Petitioner had "no quarrel with any union any place." [Tr. 271]. As Tonkin quite clearly put it, Petitioner was obligated to deal with the Independent; it was doing so and there was simply no question presented, at that time, of dealing with anyone else [Tr. 272-3]. Under these circumstances, Tonkin's remarks were proper. Absent threats or coercion, not here found, it is perfectly permissible for an employee to express a preference for one of two competing unions. Nor, as we have seen, does it constitute interference to continue to recognize and deal with a union previously dealt with, even during a rival union's organization campaign. *Stewart Warner Corp.,* 31 LRRM 1397, 102 NLRB No. 310 (1955); *Rold Gold of California,* 43 LRRM 1421, 123 NLRB No. 24 (1959).

Generally, an employer may point out to its employees the advantages of withdrawing from an existing union and forming one of their own, without loss of benefits [*Juvenile Manufacturing,* 40 LRRM 1040, 117 NLRB No. 201 (1957)], or question the integrity of a union or its officials or advert to adverse consequences of union membership, such as strikes. See *Rand Central Aircraft,* 31 LRRM 1616, 103 NLRB No. 101 (1952); *Penokee Veneer,* 20 LRRM 1273, 74 NLRB 249 (1947). Harry Tonkin's remarks said no more than this at most, and, in fact, fell far short of the statements held by these cases to be well within realm of legitimate employer comment.

The Board urges as additional evidence of Petitioner's unlawful motivation this Court's finding, on its original petition for enforcement, that Petitioner discharged employee Barwise because of his activity on behalf of the Teamsters in violation of Section 8(a)(1) and (3).[36] [R. 85]. In the first place, this Court was far from satisfied as to the reasons for Barwise's discharge and affirmed the Board's finding solely because there was evidence in the record to support an inference of discrimination.[37]

---

[36]It is worthy of note that similar charges respecting employee Olson were found by the Board to be without merit [R. 21; 71].

[37]Thus, this Court stated with regard to Barwise: "Looking now to those portions of the Board's order directing the reinstatement and compensation Barwise, *we find the evidence in conflict as to reasons for the discharge; and the record is by no means unequivocal in view of Barwise's less-than-satisfactory history of performance in the sales promotion of respondent's product.* However, respondent's knowledge of Barwise's efforts on behalf of Teamster representation, coupled with the timing

(This footnote is continued on the next page)

Moreover, it is not disputed that the fact of Barwise's activity on behalf of the Teamsters was not communicated to the Tonkins until after the contract was executed, and the "lock-out" had ended. For this reason, the Barwise episode hardly provides solid evidence of the Tonkins' motivation for instituting the "lock-out" which had taken place earlier.

Lastly, the Board points to Petitioner's alleged "intervention" in forwarding a copy of the new contract to its Regional Director on behalf of the Independent Union [R. 84]. With regard to this incident, the record supports only the inference that union officials presented an equivocal request to Millard Tonkin to transmit copies of the contract on behalf of the Independent Union. We say "equivocal" because it now seems obvious that officers Hill and Barwise were desirous of undermining the Independent Union's position in the representation case, but had no wish to make it apparent to management that they were doing so. As the original decision itself notes, they apparently wished to be able to say that Petitioner had thus "evidenced to the Board an interest in representation on the part of the union that *its officers* did not care to assert." [R. 18].

It will be noted that this decision does not accuse Petitioner of misrepresenting the *union's* position. The distinction is important, particularly in view of the de-

---

of the discharge, persuade us that the Board could reasonably have drawn the inference it did from the facts in evidence and all surrounding circumstances, notwithstanding the existence of justifiable grounds which, under other circumstances, might have permitted dismissal." (352 F. 2d 509, 511). (Emphasis added).

cision's acceptance of Millard Tonkin's testimony that he sent in copies of the agreement over the printed signature of the union "upon the understanding . . . that the union officials were agreeable to such a course, or perhaps even desirous of it . . ." [R. 18]. The Board's conclusion thus turns, not upon Peitioner's motivation, but rather upon the undisclosed intent of the Union's officers—and it is therefore untenable.

On any reasonable view, the evidence discloses merely that Tonkin believed he was accommodating Hill and Barwise by assisting them to comply with what the parties took to be a direct request by the Regional Director. Further, there is no evidence that the Union's rank-and-file was contacted by the officers or that *their* position on the matter was solicited. Indeed, Hill and Barwise took their advice from a *Teamster* representative [Tr. 38-39]. Management's act in submitting a contract on behalf of the Independent, was in conformity with their wholly reasonable supposition that the Independent wished to communicate to the Board its interest in the matter.

VII.
CONCLUSION.

Petitioner earnestly submits that the record in this case, fairly viewed and in its entire context, discloses only a history of good faith dealing on the part of an employer with the acknowledged representative of its employees.

If the events in this case are viewed in such a context, they inexorably lead to the conclusion that the Board's findings herein are totally without founda-

tion. The great weight of evidences establishes that prior agreement was reached orally on the terms of the new contract and that Petitioner's subsequent activities were aimed solely at insuring its formal execution. But even assuming that Petitioner had not reached agreement with the Independent and had engaged in a "lock-out" to bring economic pressure to bear and force the union to accept its contract terms, such activity was in aid of Petitioner's good faith bargaining position and fully protected by the *American Ship* decision.

The Board's attempts to distinguish that case have forced it to a totally unrealistic and illogical position. For many years prior to the events in question Petitioner had recognized and dealt with the Independent Union. Had it broken off negotiations or refused to deal with it, it would have been guilty of unlawful refusal to bargain. Had it demonstrated or extended preference or support to the Teamsters claim at any tme it would have been equally guilty of unfair practices. And yet, if the Board's findings be given close scrutiny it is punishing Petitioner for not having done these very things. Even in the exercise of its clairvoyant hind-sight, the Board does not indicate just how Petitioner, consistent with the obligations imposed on it by the Act, might have acted otherwise, in the premises. In short, the decision is not only without support in the evidence, but contradicts the law *and* itself in the bargain. We most earnestly request that enforcement, accordingly, be denied.

Respectfully submitted,

Hill, Farrer & Burrill,
M. B. Jackson,
Kyle D. Brown,
Attorneys for Petitioner.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KYLE D. BROWN

APPENDIX.

National Labor Relations Act.

Sec. 7: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in 8(a) (3).

Sec. 8(a): It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an

agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made [and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g), (h)] and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Sec. 10(f): Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in Section 2112 of Title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manners as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

No. 21,130

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TONKIN CORPORATION OF CALIFORNIA, dba SEVEN-UP BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR REHEARING.

HODGE, JACKSON, KUMLER & CROSKEY,
145 South Rodeo Drive,
Beverly Hills, Calif. 90212,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

No. 21,130

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TONKIN CORPORATION OF CALIFORNIA, dba SEVEN-UP BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR REHEARING.

Petitioner, Tonkin Corporation of California, D/B/A Seven Up Bottling Company of Sacramento, respectfully petitions the Court to grant a rehearing in this cause with respect to the Court's decision of 29 March, 1968, on the basis of the following considerations and grounds:

A. The Court has held that the Petitioner Employer committed violations of the Act because it locked out its employees on 1 April, 1963, for the purpose, *inter alia,* of preventing its employees from "freely determining their bargaining representative and otherwise keeping the Union subservient to it as a bargaining representative." (Slip Opinion, p. 6).

B. Assuming, *arguendo,* that there is evidence to support this finding, the decision overlooks the following critical and undisputed facts:

1. No issue of representation or cognizable question regarding choice of bargaining representative was ever presented at any time pertinent to the activity under review:

(a) The context of the matter was a bargaining situation, not a representation proceeding;

(b) The Union was and had been the acknowledged bargaining representative of the employees for several years;

(c) No claim of representation, claim of majority, demand for recognition or offer of showing was *ever* made by the Teamsters; a Petition for an election was filed with the Board on the day after the commission of the alleged violations and only came to the Employer's attention some four days later. The fact that a number of cards were signed is not evidence to the contrary. This was brought out for the first time at the hearing; the cards were never placed in evidence, and there is nothing to indicate whether they purported to authorize representation or merely an election.

2. The Employer was at no time under any duty to recognize or bargain with the Teamsters.[1]

3. The Employer was at all times under a mandatory obligation to recognize and bargain with the Union until it had been rejected or replaced pursuant to the majority vote of its employees in a manner consonant with the provisions of the Act, none of which here obtained.

4. The Employer was perfectly entitled, under the authorities cited, to express a preference as between two competing unions, or point out to its employees the relative advantages and disadvantages of membership in either.

5. The Employer, under the authorities cited, was perfectly entitled to prefer dealing with the Union and to seek agreement with it while it continued to be the bargaining representative of its employees.

6. The employer was perfectly entitled to resort to the lockout in order to secure agreement or to enforce its legitimate aims:

(a) To hold the Union to the admitted bargain previously struck, particularly when it was apparent that the Union's officers were attempting to persuade the membership to renege on it;

(b) To require the execution of a written contract embodying the terms of the oral agreement already concluded.[2]

---

[1]The Trial Examiner's decision (confirmed by the Board), held as follows: "Although in late March, the Respondent was aware that the employees were showing some interest in the Teamsters, no claim of representative status was made by that organization until April 2. Thus it appears that Respondent was wholly free, at least until then, to deal with the Union and to reach whatever agreement with the Union that it could." [Trial Examiner's Decision, p. 7, line 60; p. 8, lines 1-5].

[2]Section 8(d) of the Act provides, in pertinent part, as follows: "For the purposes of this Section, to bargain collectively is the performance of the mutual obligation of the employer

(c) To encourage the preservation of a stable and harmonious bargaining relationship of several years' standing.

C. The fact that the contract, concluded with the Union, operated in bar of further Teamster efforts or that this result may have been desired or even formed a part of the Employer's purpose was not, under the circumstances, illegal:

1. It is perfectly proper for an employer to desire to preserve a legitimate bargaining relationship of long standing and to promote its continuance by *legal* means.

2. Every action of the Employer here, through the critical events of 1 April, was perfectly legal in and of itself.

3. The foreclosure of a question of choice, if any there was, resulted solely from the failure of the Teamsters to take timely and appropriate action. The employer cannot be penalized for Teamster tardiness or charged with knowledge of circumstances of which it was never made aware. The elements of the instant situation are inherent in every bargaining situation where employees may have unmanifested reservations about their bargaining representative.

4. The employer here was guilty of foresight, at most, and of having moved, by legal means, to maintain the stability of its bargaining relationship. The Board's decision, here confirmed, converts legal means and legitimate purpose into illegal conduct solely through the arbitrary and mistaken application of hindsight.

5. The employer's conduct was not inimical to the bargaining process; it was the conduct of the Union's

---

and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, *and the execution of a written contract incorporating any agreement reached if requested by either party . . .*" (Emphasis added).

officers which had as its admitted purpose, later revealed, the frustration of that process and repudiation of the agreement on which the parties had shaken hands.

D. The fact that the Union may have been "subservient" is without legal significance and, therefore, not pertinent:

1. The Union was held by the Board to be a labor organization within the meaning of the Act.

2. The Board found that the Union was at no time dominated by the employer or the recipient of unlawful assistance.

3. Legally, the Union stood on the same footing as the Teamsters, and the same considerations would, of necessity, apply had their situations been reversed. The fact that the Union may have been easier to deal with is not, therefore, a ground for penalizing the employer.

E. The decision is contrary to the specific mandate and to the stated policy of the Act:

1. It condones, and even rewards, the illegal conduct of the Union's officers in violating their fiduciary duties to the Union and its membership.[3]

---

[3]Section 501(a) of the Landrum-Griffin Act, 27 U.S.C., Section 501(a), provides, in pertinent part: "The officers . . . of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, . . . *to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any manner connected with his duties. . . .*" (Emphasis added). See also *Johnson v. Nelson,* 325 F. 2d 646 (8th Circuit-1963), in which the reviewing Court said of this statute, "Thus it plainly appears that the statute is broad in its reach. Officers and other Union representatives may not act adversely to their organization or to the members as a group, or acquire a personal interest which is contrary to the interests of the organization. Being trustees, the officers must subvert their own personal interests to the lawful mandates and orders of the organization." (At p. 650).

2. It stigmatizes and punishes the Employer for observing and pursuing its duty to bargain in good faith, when, had it acted otherwise than it did, it would have been guilty of unlawfully refusing to bargain with the acknowledged representative of its employees, and of contributing unlawful assistance to the Teamsters. It must be borne in mind that at the time of the events in question, the Employer had no actual notice of any Teamster organizing activity (which had commenced only the preceding day!), and had been presented with no demand by the Teamsters for recognition and had been tendered no evidence that either the Teamsters or anyone else, other than the Union with which it had been properly bargaining, represented the majority of its employees for collective bargaining purposes. Under these circumstances, for the Employer to have declined to bargain with the Union or to have extended any preference whatever to the Teamsters, would have constituted the most egregious violation of the Act under a host of the Board's own cases.

We earnestly believe the Court will conclude, upon re-examination, that the decision cannot be supported since, in proper perspective, it contravenes the policy and purpose of the Act, the cases which interpret it, and the pertinent doctrine of the Board itself. For these reasons, we urge that this Petition be granted.

Respectfully submitted,

Hodge, Jackson, Kumler & Croskey,
By Morton B. Jackson,
Attorneys for Petitioner.

Certificate.

The undersigned certifies that he has examined the provisions of Rules 18, 19 and 23, of this Court and that, in his opinion, the tendered Petition conforms to all requirements.

He also certifies that the foregoing Petition for Rehearing is presented in good faith, that it is, in his opinion, well taken and is not interposed for purposes of delay.

Morton B. Jackson

No. 21,130

In the United States Court of Appeals for the Ninth Circuit

TONKIN CORP. OF CALIFORNIA d/b/a SEVEN UP BOTTLING CO. OF SACRAMENTO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review and Cross-Petition to Enforce a Supplemental Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ELLIOTT MOORE,
LINDA SHER,
Attorneys,

National Labor Relations Board.

INDEX

AUTHORITIES CITED

Cases:

Cases—Continued Page

Statute:

In the United States Court of Appeals for the Ninth Circuit

No. 21,130

TONKIN CORP. OF CALIFORNIA d/b/a SEVEN UP BOTTLING CO. OF SACRAMENTO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review and Cross-Petition to Enforce a Supplemental Order of the National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of Tonkin Corp. of California (herein "the Company") to review a supplemental order of the National Labor Relations Board issued May 27, 1966, after proceedings pursuant to this Court's remand. *N.L.R.B.* v. *Tonkin Corp.*, 352 F. 2d 509. In its answer, the Board has requested enforcement of its order. The

Board's supplemental decision and order are reported at 158 NLRB No. 110. This Court has jurisdiction of the proceeding under Sec. 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), the unfair labor practices having occurred in Sacramento, California, where the Company bottles and sells soft drinks.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact

In its initial decision and order, reported at 147 NLRB 401, the Board found that the Company violated Section 8(a)(2) of the Act by interfering with the administration of the Sacramento Seven-Up Employees' Union (herein "the Union"), and by locking out its employees in order to secure immediate acceptance of its new contract terms by the Union so that it could forestall organizational efforts of the rival Teamsters and keep the Union subservient to it.[1] The Board reaffirmed this finding in its supplemental decision and also reaffirmed its conclusion that the lockout was designed to discourage membership in the Teamsters and encourage membership in the Union, and hence that the Company thereby also violated Section 8(a)(3) and (1) of the Act. The facts are these:

---

[1] The Board also found in its prior decision that the Company discriminatorily discharged William Barwise because of his activities on behalf of the Teamsters. This finding was affirmed by this Court (*N.L.R.B.* v. *Tonkin, supra,* at p. 511) and is not in issue here.

A. *The Union*

For a number of years the employees of the Company have been represented by the Union. They comprise its entire membership and are required to belong as a condition of employment (R. 16; Tr. 46-47, 131-132, 406-407, GCX 2, p. 6). The Union was established internally at the Company at an undisclosed date in order "to keep the Teamsters out" (Tr. 422) and has functioned fitfully since its inception (Tr. 418, 420). In 1961, during the presidency of employee Jim Elder, the Union first acquired by-laws (Tr. 108). It has no office (Tr. 412), keeps sporadic records (Tr. 412, 420), and its infrequent meetings have been primarily social (R. 16; Tr. 125-127, 116-120, 9, 85, 403, 412-413, 418-422). Business meetings are held only to elect officers and during contract negotiations; no grievances have ever been processed (Tr. 419, 413, 422-423). In 1963, President Elder resigned from the Union, having been promoted to a supervisory position (Tr. 126-127) and in February of that year, Howard Hill became president (Tr. 85).

B. *The contract negotiations*

Shortly after the election of new officers, the Union and the Company began negotiations for a new contract. Several inconclusive meetings were held and on March 27, four days before the existing contract was to expire, the employees rejected the Company's most recent offer (Tr. 15-18). On Friday evening, March 29, Company President Harry Tonkin held a meeting of all employees to discuss the contract (R. 16; Tr. 17-19). Tonkin told the men that they could not go

to work Monday morning unless the contract was signed[2] (R. 17; Tr. 160, 76-77, 25-26, 107-108, 258). He added that the Company would find new men to take the place of those who did not want to work (Tr. 160, 107). Tonkin further stated that he knew that some of the employees had been approached by the Teamsters and asserted that he did not want to negotiate with the Teamsters (R. 17; Tr. 20-22, 76, 155-160, 271-272).

After Tonkin left, the employees discussed the Company's contract proposal. Although it was generally agreed that the men should get what the rest of the industry was getting, not enough men remained at the meeting to take a vote. (R. 16; Tr. 23-25, 99-102, 340, 334). Later that evening, a small group of employees, including Union President Howard Hill, and William Barwise, its secretary-treasurer, went to the Company's office to confer with Harry Tonkin and his brother Millard, the Company's vice-president *(ibid.)*. Hill said that in discussing contract matters he could make no final commitment, because any agreement would be subject to ratification by the Union membership (Tr. 101-102, 262). The employees asked for concessions on such items as holidays, a bonus plan, sick leave, and health and welfare, but Tonkin either rejected the requests or merely replied that the Company would do the best it could in the

---

[2] Three employees testified to this statement by Tonkin: Union President Hill (Tr. 107-108); Secretary-treasurer Barwise (Tr. 76); and Donald Olson (Tr. 160). Furthermore Harry Tonkin admitted that he told the employees that they could come to work "under these conditions" (Tr. 258).

future and refused to incorporate any of these matters into the written contract (Tr. 100-101, 108-109, 62-65).

The employees expressed dissatisfaction at the Company's offer of a three dollar a week raise. The Tonkins offered to match any higher rate paid by the local Pepsi-Cola bottling concern. The employees present expressed satisfaction with this point, Mr. Tonkin offered to find out what "Pepsi" was going to do, and the meeting broke up (Tr. 82-83). The next day, Saturday, Millard Tonkin called the president of the Pepsi-Cola concern to ask about their wage rate, but learned that Pepsi-Cola too was deadlocked over wages. Tonkin then called Bernal Williams, an employee who had been at the meeting, and reported this development to Williams (Tr. 299).

C. *The lockout*

On Sunday, March 31, Hill, Barwise, and Williams, at Barwise's suggestion, met with some Pepsi-Cola employees and a Teamsters representative (R. 17; Tr. 26-27). Barwise signed a Teamsters card himself and during that afternoon and the next morning solicited other Company employees on behalf of the Teamsters (R. 17; Tr. 26-28). By Monday morning he and Hill had submitted 9 bargaining authorization cards to the Teamsters from among the Company's 17 employees *(ibid.)*.

On Monday morning, April 1, the Company employees found the gate to the truck yard locked (R. 17; Tr. 29, 129, 162). They were unable to go to work and stood around outside the building (R. 17; Tr. 141,

337). When all the employees reported for work, Harry Tonkin assembled them in the plant office and announced that no one could go to work until the contract was signed (R. 17; Tr. 163-164). Tonkin told the men, "We have this contract and if any of the Union officials don't want to go to work, we will have a new election and get new plant union officials" (R. 17; Tr. 163-164, 131). Tonkin also observed that if the men did not want to work, the Company had no lack of job applicants (R. 17; Tr. 164). He added that he knew some of the employees had been contacted by the Teamsters and questioned why the men wanted to be "dominated" by that union (Tr. 30). During the course of the meeting, the employees twice withdrew to vote on the Company's proposal and twice rejected it (R. 17; Tr. 31-36, 162-163). Following the second vote, however, the men began to wander back into the plant. Later that morning, Hill and Barwise signed the contract without formal approval of the membership *(ibid.)*. While they were signing the contract, Harry Tonkin or his brother, Millard, said that the Company would find out who had solicited cards for the Teamsters, and Barwise admitted that he had done so (R. 17; Tr. 35-36).

D. *Subsequent events*

On April 2, the Teamsters filed with the Board's regional office a petition for a representation election among the Company's employees (R. 18; GCX 3a). The regional office then wrote the Company and the Union notifying them of the petition and asking if any collective bargaining agreement was in effect (R.

18; Tr. 69-71, RX 2). The Union was advised that if it claimed any interest in the proceeding, it should reply by April 8, 1963, forwarding two copies of any contracts it had with the Company, and that if it did not reply the Board would assume that it had no interest (R. 18; RX 2). On April 5, the Tonkins summoned Hill and Barwise to the Company's office and questioned them about the letters from the Board (R. 18; Tr. 36-40, 110-111). Hill explained that the Teamsters' petition had been filed as a result of the cards which he and Barwise had solicited (R. 18; Tr. 137). The Tonkins offered to make a copy of the contract for the Union to submit, but Hill said that he had not decided whether to reply (R. 18; Tr. 38). The next day, Hill and Barwise advised Millard Tonkin that the Company could do as it wished, but the Union was not "going to do anything about it in any manner whatsoever" (R. 18; Tr. 39-40, 110-111). Thereupon Millard Tonkin mailed a copy of the contract to the Board on behalf of the Company and another copy on behalf of the Union (R. 18; Tr. 318-319, 324). The latter was in an envelope bearing the Union's return address, with a letter of transmittal reading:

> The enclosed contracts are sent as requested by the NLRB
>
> 7-Up Employees Union of Sacramento

On April 9, the day after receiving a copy of the charge in this case, the Company discharged Barwise, allegedly for failure to keep up his sales (R. 18; Tr. 41, 48, 286-287).

On April 24, the Tonkins called Hill into their office and said that the labor problem had proved unsettling. Hill was asked ". . . if we couldn't try to figure out some way where we could get the fellows back to work in peace of mind on the job . . ." The Tonkins asked who was responsible for the unfair labor practice charge. Hill said he would try to find out but then dropped the subject (R. 20; Tr. 91-97). Two days later, Hill called a meeting of the Union membership and asked for a vote of confidence on whether to continue pressing the unfair labor practice charge. A majority voted to continue pressing the charge (R. 20; Tr. 103-106).

The Board's Conclusions and Order

In its initial decision, the Board found, *inter alia*, that the Company violated Section 8(a)(2), (3) and (1) of the Act by locking out its employees and otherwise interfering with the employees' choice of bargaining representative. The Board ordered (R. 23-24, 72) the Company to cease and desist from the violations found and from in any other manner abridging the employees' rights under the Act, to withdraw recognition from the Union unless and until it is certified as bargaining representative by the Board, to reimburse the employees with interest for dues checked off under the April 1 contract, and to post appropriate notices.

The Board also found that the Company, in violation of Section 8(a)(3) of the Act, discharged William Barwise because of his advocacy of the Teamsters and opposition to accepting the contract. This

Court enforced the Board's order as to reinstatement of Barwise commenting "[the Company's] knowledge of Barwise's efforts on behalf of the Teamster representation, coupled with the timing of the discharge, persuade us that the Board could reasonably have drawn the inference it did . . . ." *N.L.R.B.* v. *Tonkin Corp.*, 352 F. 2d 509, 511. However, the Court, in light of the Supreme Court's intervening decision in *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, remanded the case to the Board to reassess the legality of the lockout. *Tonkin Corp.*, *supra*, 352 F. 2d at 510-511. The Court noted that there the Supreme Court had upheld the lockout as an offensive weapon "to support a legitimate bargaining position, after an impasse in collective-bargaining negotiations had been reached." *Supra*, at 510. Here, however, the presence of "evidence that [the Company] was inhospitable to any prospect of the Teamsters' Union becoming bargaining representative" combined with the organizational activity "interspersing the collective bargaining process" led the Court to remand to the Board to examine these circumstances in light of the holding in *American Ship. (Ibid.)*.

The Board, on remand, reaffirmed its initial decision and order. The Board pointed out that here, unlike in *American Ship*, the Company's use of the lockout was designed, not to achieve legitimate economic demands, but to "frustrate the process of collective bargaining by preventing a free choice of a bargaining representative by the employees."

ARGUMENT

I. Substantial Evidence on the Whole Record Supports the Board's Finding That the Lockout Was Designed to Frustrate the Employees' Ability to Freely Select a Bargaining Agent

A. *The controlling principles*

In *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, the Supreme Court upheld the legality of the lockout employed "solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached." *Id.* at 308. Cf. *N.L.R.B.* v. *David Friedland Painting Co., Inc.*, —— F. 2d —— (C.A. 3, No. 16032, decided April 25, 1967, sl. op. pp. 7-9, 65 LRRM 2119, 2123). Stressing the limited nature of the issue posed for decision, the Court added, "This is the only issue before us, and all that we decide." *Ibid.* The Court went on to outline the kinds of lockouts not legalized by its decision. The Court cautioned:

> It is important to note that there is here no allegation that the employer used the lockout in the service of designs inimical to the process of collective bargaining. There was no evidence and no finding that the employer was hostile to its employees' banding together for collective bargaining or that the lockout was designed to discipline them for doing so. It is therefore inaccurate to say that the employer's intention was to destroy or frustrate the process of collective bargaining." *Id.* at 308-309.

The Court further noted that the unions involved in *American Ship* "have vigorously represented the em-

ployees since 1952, and there is nothing to show that their ability to do so has been impaired by the lockout." *Id.* at 309. The Court concluded that for a lockout to be proscribed "the Board must find that the employer acted for a proscribed purpose." *Id.* at 313, or that the necessary effect of the lockout implies such a purpose. *Id.* at 311-312. See *N.L.R.B.* v. *Golden State Bottling Co.*, 353 F. 2d 667, 669-670 (C.A. 9).

B. *The Company's motive in locking out its employees to force their immediate acceptance of the contract was to prevent Teamsters' organizational efforts and keep the Union subservient to it*

As shown in the Counterstatement, the Union was a weak, loosely organized group originally established to keep the Teamsters out of the plant. Its sporadic activities were mainly social and its militancy can be measured by the fact that it had never processed a grievance. The Union's weakness was further reflected in its impotency at the bargaining table. It could not even convince the Company to incorporate in the contract concessions to which Company President Harry Tonkin orally agreed (Tr. 100-101, 108-109, 62-65). Moreover, Harry Tonkin's confidence in his ability to manipulate the Union is well demonstrated by his assertion on the morning of the lockout that "if any of the Union officials don't want to go to work, we will have a new election and get new plant union officials." In light of these facts, it is not surprising that President Tonkin preferred to deal with the Union rather than with the Teamsters.

President Tonkin was quite emphatic about this preference for bargaining with the Union. At the Friday evening meeting, March 29, Tonkin announced that he did not want to negotiate with the Teamsters. He added that he knew some of the men had been approached by that organization.[3] He repeated these statements on Monday morning when he told the men that he wanted a contract with the Union and that nobody was going to work until he got the contract signed.

Even after the employees capitulated and signed the contract, the Company continued its efforts to forestall any organizational efforts on behalf of the Teamsters. By questioning, it learned that William Barwise had been the principal solicitor for the Teamsters. When the Teamsters filed a petition for a Board election and the Company learned that the Union was not going to assert its contract as a bar to the election,[4] it unilaterally filed papers in the Union's name to assert that claim. Finally, with the filing of an unfair labor practice charge which could invalidate

---

[3] The record does not disclose evidence of organizational efforts by the Teamsters among the Company's employees—as opposed to other Sacramento soft-drink employees—prior to Sunday, March 31. The important point, however, is that Tonkin clearly thought that the Teamsters were trying to organize his plant and wanted to forestall such attempts. Whether or not organizational activity had actually commenced at that point is immaterial to the issues here.

[4] Under the Board's contract-bar rule, an election petition will not be entertained for the duration of a collective bargaining agreement covering the unit or for 3 years from its execution, whichever is less. General Cable Corp., 139 NLRB 1123.

the contract—and remove it as a bar to an election,[5] the Company fired Union official Bill Barwise. It then called in Union President Hill to see if the unfair labor practice charge could be settled "amicably and peaceably and everyone could go to work and not have this hanging over their heads" (Tr. 95). From these facts, the Board concluded that the purpose of the Monday morning lockout was not to force acceptance of legitimate contract demands. Rather, it was part of a plan to forestall Teamsters organizational efforts while simultaneously keeping the Union malleable to its will. It has long been settled that a lockout to discourage employee interest in a disfavored union or promote a favored union violates Section 8(a)(3) of the Act. See, for example, *N.L.R.B.* v. *National Motor Bearing Co.*, 105 F. 2d 652, 657-658 (C.A. 9); *N.L.R.B.* v. *Cowell Portland Cement Co.*, 148 F. 2d 237, 240, 243 (C.A. 9), cert. den., 326 U.S. 735.

Of course, in circumstances such as these, a lockout *could* have been related to a simple desire to secure the fruits of collective bargaining, but the only fact in the record which adequately explains the Company's haste in securing the contract—or its subsequent unlawful efforts to protect that contract—is the threat posed by Teamster affiliation. And as this Court noted when the case was here before (352 F. 2d at 511), the events of Teamster activity "were intimately interlaced with the events of April 1 and the earlier company-union contract negotiations." Accordingly, as the Court earlier recognized with respect

---

[5] See *N.L.R.B.* v. *Spiewak, et al.*, 179 F. 2d 695 (C.A. 3).

to the discharge of Barwise (352 F. 2d at 511), the question is not whether the Company *had* "justifiable grounds which, under other circumstances, might have permitted [its action]," but whether the Company's conduct was in fact motivated in whole or in part by a desire to discourage negotiation through the Teamsters. Accord: *N.L.R.B.* v. *Security Plating Co., Inc.*, 356 F. 2d 725, 728 (C.A. 9); *Shattuck Denn Mining Corp.* v. *N.L.R.B.*, 362 F. 2d 466, 470 (C.A. 9). The Company apparently recognizes this controlling authority, because it argues throughout its brief that the "sole" motivation for the lockout was to bring pressure in aid of the Company's "good faith bargaining position." Thus, the Company does not contend that it was privileged to use the lockout to deprive its employees of union representation of their own choosing, but argues that its activity was unrelated to that aim.

In keeping with this contention, the Company, in its brief, disputes the facts as found by the Board. The Company contends that on Friday evening, March 29, the Union had agreed to accept its proposed contract and avers that all concerned considered the ratification meeting on the following Monday to be a mere formality. (Pet. brief pp. 12, 14, 30-36). But the Company ignores the crucial fact that central to what the employee representatives tentatively agreed to accept was the Company's offer to match the wage rate prevailing in the industry, specifically that of the Pepsi-Cola Bottling Company. Even the Company's own witnesses testified to this effect. (Tr. 340, 334). The representatives did not agree to ac-

cept the Company's wage offer and, once it was discovered that "Pepsi" was deadlocked on wages, there was no agreement on wages at all. Moreover, the Company does not dispute that the Union representatives told the Tonkins that no agreement could be made without a ratification vote by the membership. Rather, it suggests—without claiming the support of any record evidence—that such a vote was not required by the Union's by-laws and was part of a plot by the Union's officers to repudiate the contract on behalf of the Teamsters. (Pet. br. pp. 36-37). Such speculation is groundless; the Union officers were not even approached by the Teamsters until Sunday, two days after they had informed the Tonkins that a ratification vote would be necessary.

Next, the Company asserts that there was no lockout; that the Tonkins locked the gate on Monday morning not to prevent the employees from working but for the purpose of facilitating the ratification vote. (Pet. br. pp. 16, 37-38). The Company ignores the credited evidence that Harry Tonkin—both on Friday evening and Monday morning—told the employees that they would not be allowed to work without a contract. Moreover, as a witness Harry Tonkin as much as admitted he had made such a threat on Friday evening. When asked:

> "did you say anything to the effect that anyone who did not accept the contract would not be permitted to work?"

Tonkin replied:

> "I didn't put it that way, sir"

He then explained how he did "put it."

> "we pointed out that we have a contract with you, we hope to renew it. We hope that you will accept our proposition. We have no intention of discharging anybody. *Any of you who want to come to work Monday morning under these conditions, are more than welcome. If anybody felt that they couldn't agree or did not feel that they want to work under these conditions, that was their privilege to do what they want.*" (emphasis supplied). (Tr. 257-258).

Moreover, three employees testified that Harry Tonkin said on Friday evening that the men could not work without a contract.[6] Then on Monday morning, in case the locked gate did not make the Company's position sufficiently clear, Tonkin assembled the men in his office and told them that no one could work until the contract was signed. These facts clearly establish the existence of a lockout.

Finally, the Company claims that even if there were a lockout, its purpose was only to force ratification of the contract already agreed upon and was therefore lawful under the rule of *American Ship.* But, as we have shown, no agreement had been reached on the contract on Friday evening. Furthermore, the Company's assertions that it was the union leaders in tandem with the Teamsters rather than itself that frustrated representation by the Union is not borne out by the evidence (Pet. br. pp. 50-53). Again this position is based on the erroneous assump-

---

[6] Petitioner errs in its brief (p. 10, n. 7) in stating that only one employee so testified (*supra*, p. 4, n. 2).

tion that agreement was reached on Friday evening. Secondly, it ignores the fact that the union leaders did not seek out the Teamsters. Rather they encountered the Teamsters representative when meeting with an employee of "Pepsi" to discuss their common concern over wages in the industry. Furthermore it is clear that a majority of the employees supported their leaders as the only votes taken on Monday morning repudiated the contract offered by the Company. Finally, three weeks after the unfair labor practice charge was filed, and after the Company had spoken to Union President Hill about it in an attempt "to figure out some way where we could get the fellows back to work in peace of mind on the job," the membership voted to continue pressing the charge, thus giving their leaders a vote of confidence.

We submit that the record amply supports the facts as found by the Board. In contrast, the version of the facts advanced by the Company, but discredited by the Examiner and the Board both in the initial proceeding and on remand, is not borne out by the record. Nor is the Company correct in stating that this Court must apply a special, more rigorous standard in evaluating the evidence in a case where the Board had credited the General Counsel's witnesses and discredited those of the Company (Pet. br. p. 27).[7] The line of cases in the Fifth Circuit that the

---

[7] In any event as shown in the Counterstatement, the Examiner did not discredit all of the Company's witnesses. Even if he had done so, even the "total rejection of an opposed view cannot impugn the integrity or competence of a trier of fact." *N.L.R.B.* v. *Pittsburgh S.S. Co.*, 337 U.S. 656, 659.

Company relies on for this proposition was expressly disapproved by the Supreme Court in *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404. There the Supreme Court reiterated the applicable standard:

> "We granted certiorari because there was a seeming non-compliance by [the Fifth Circuit] with our admonitions in *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474. We there said that while 'the reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view,' it may not 'displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.' "

Finally, the Company argues (Br. 60) that the Board's decision condemns the Company for not breaking off negotiations with the Union and for not extending "preference and support" to the Teamsters. Of course, this contention is totally without foundation. What the Board found unlawful was the Company's coercion of its employees—that is, its interference in the *internal* affairs of the Union and its attempts to *discourage* Teamster affiliation. Cf. *Wells, Inc.* v. *N.L.R.B.*, 162 F. 2d 457, 459 (C.A. 9). Nothing in the Board's order suggests that the Company should have erred in the opposite direction.

CONCLUSION

For the reasons stated, we submit that a decree should issue denying the petition for review and enforcing the Board's order in full.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ELLIOTT MOORE,
LINDA SHER,
Attorneys,

National Labor Relations Board.

May 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

☆ U. S. GOVERNMENT PRINTING OFFICE; 1967 262825 879

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERT B. BARBOSA, Petitioner-Appellant, v. RENCE E. WILSON, Warden, ifornia State Prison, Quentin, California, et al., Respondent-Appellee.	No. 21132

BRIEF OF APPELLEE

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI,
Deputy Attorney General

HORACE WHEATLEY,
Deputy Attorney General

6000 State Building
San Francisco, California
Telephone: 557-2848

Attorneys for Respondent-Appellee

TOPICAL INDEX

TABLE OF CASES

TEXTS, STATUTES AND AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT B. BARBOSA, Petitioner-Appellant, v. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, et al., Respondent-Appellee.	No. 21132

BRIEF OF APPELLEE

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code sections 2241, 2242 and 2243. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts.

Appellant, Albert Barbosa, was convicted of violati section 11501 of the Health and Safety Code, to wit: transportation or sale of a narcotic other than marijuana, after a trial by jury during which he was represented by the public

defender; on May 24, 1962, he was sentenced to state prison for the term of ten years to life (CT 2-8).*

Appellant did not appeal the conviction (CT 2). However, petitions for habeas corpus were filed in the Superior Courts of Los Angeles County, in the Superior Court of Marin County, and in the Supreme Court of the State of California (CT 5). The petition for writ of habeas corpus in the Los Angeles County Superior Court was denied, according to petitioner, because it was not properly prepared, and the petitions in the Marin County Superior Court and the Supreme Court of California were denied on June 25, 1965, and October 1965 respectively (CT 6). Substantially the same factual and legal issues presented to the District Court were raised in those petitions (CT 6).

B. Proceedings in the federal courts.

On December 21, 1965, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (CT 1-30). On December 20, 1965, the District Court denied the petition on the grounds that appellant had not recited any facts in support of his "bare allegation" that he was inadequately represented by counsel, and that the prior offense for which petitioner was placed on probation for five

---

* As hereinafter used, "CT" refers to the transcript of record filed in this Court, constituting the United States District Court Clerk's record on appeal.

years, conditional upon his serving one year in the county jail, was nonetheless a felony under California Penal Code section 17 (CT 30-31).

The same arguments, i.e., inadequate representation of counsel and improper use of a prior conviction in sentencin appellant, were again presented to the District Court in a petition for rehearing (CT 32-48). The court treated the petition for rehearing as a new petition for habeas corpus and, after exhaustive analysis, again rejected the contentions raised by appellant (CT 49-52). However, the court did grant appellant's motion for leave to appeal its order dismissing the petition for habeas corpus and permitted him to proceed in forma pauperis, pursuant to Title 28, United States Code section 1915 (CT 64).

SUMMARY OF APPELLEE'S ARGUMENT

Appellant's attack upon the use of his prior narcotics conviction to increase his present term is not supported by the law.

ARGUMENT

In his appeal from the District Court's denial of his petition for a writ of habeas corpus, appellant again asserts that he was improperly sentenced as having suffered a prior felony conviction since his first narcotics conviction resulted in a county jail sentence (AOB 3-4). Appellant argues that to use his prior narcotics conviction to increase his subsequent narcotics conviction is an ex post facto

application of the law, cruel and unusual punishment, and a denial of due process and equal protection of the law (AOB 2-9). None of these arguments is supported by the law.

It has been uniformly held that statutes that provide for an increased penalty for subsequent offenses do not result in double jeopardy or cruel or unusual punishment. Beland v. United States, 128 F.2d 795, 797 (5th Cir. 1942); People v. MacDaniels, 165 Cal.App.2d 283, 286 (1958). Nor do such statutes violate the due process or equal protection provisions of either the federal or state constitutions. Id. at 286; People v. Dutton, 9 Cal.2d 505, 507 (1937); In re Rosencrantz, 205 Cal. 534, 537-40 (1928). Neither is the use of a prior narcotics conviction to increase a subsequent narcotics sentence an ex post facto application of the law. Statutes imposing aggravated penalties upon persons who have been previously convicted of crime have long been recognized in this country and in England; by such statutes habitual criminals are not punished for their earlier offense, "but the repetition of criminal conduct . . . justifies heavier penalties when they are again committed." Graham v. West Virginia, 224 U.S. 616, 623 (1912); Beland v. United States, 128 F.2d 795, 797 (5th Cir. 1942), cert. denied 317 U.S. 676, rehearing denied 317 U.S. 710.

It is unquestionably clear that the Legislature has determined that prior narcotics offenders should be punished more severely than first offenders (e.g., Health

and Safety Code §§ 11500, 11501, 11502, 11530, 11531, 11532, 11540, 11557, 11715.6), and the constitutionality of punishing recidivists more severely than first offenders has long been established. Graham v. West Virginia, supra; McDonald v. Massachusetts, 180 U.S. 311 (1901); Sherman v. United States, 241 F.2d 329, 335-36 (9th Cir. 1957), cert. denied 354 U.S. 711; People v. d A Philippo, 220 Cal. 620 (1934), cert. denied 293 U.S. 614; People v. Hainline, 219 Cal. 532 (1933); People v. Stanley, 47 Cal. 113 (1873); Ex parte Gutierrez, 45 Cal. 429 (1873). Hence, appellant's allegations that he is being placed twice in jeopardy by sentencing him as a recidivist, that such sentence is an ex post facto application of the law, cruel and unusual punishment, and a denial of due process and equal protection of the laws, must be rejected as sham, frivolous and devoid of merit.

CONCLUSION

For the reasons stated, it is respectfully submitted that the order of the District Court denying appellant's petit for writ of habeas corpus be affirmed.

Dated: September 29, 1966.

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI,
Deputy Attorney General

HORACE WHEATLEY,
Deputy Attorney General

Attorneys for Respondent-Appellee

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

Dated: San Francisco, California

September 29, 1966

HORACE WHEATLEY
Deputy Attorney General
of the State of California

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGIL LEE SMITH, Petitioner-Appellant, vs. LAWRENCE E. WILSON, Warden, California State Prison, Tamal, California, Respondent-Appellee.	No. 21133

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

KARL S. MAYER
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-1851

Attorneys for Respondent-Appellee.

TOPICAL INDEX

TABLE OF CASES

STATUTES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGIL LEE SMITH, Petitioner-Appellant, vs. LAWRENCE E. WILSON, Warden, California State Prison, Tamal, California, Respondent-Appellee.	No. 21133

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

This brief represents the initial appearance of the California Attorney General, on behalf of appellee

and respondent Lawrence E. Wilson, in this matter. Appellee filed no pleadings in the court below.

On February 24, 1953, appellant was convicted in the Superior Court for the City and County of San Francisco of violation of California Penal Code section 211 (second degree robbery) and was sentenced to the state prison for the term prescribed by law (one year to life, Pen. Code §§ 213, 671). This conviction followed appellant's plea of not guilty and trial by the court sitting without a jury during which he was represented by the public defender. A certified copy of this judgment and order of commitment is annexed hereto in the Appendix and is "EXHIBIT A."[1/]

On October 21, 1957, appellant was convicted in the Superior Court for the County of San Joaquin of violation of California Penal Code section 211 and sentenced to the state prison for the term prescribed by law, the sentence to run consecutive to any other incompleted sentences. This conviction followed appellant's plea of guilty, at the time of entry of which he was represented

---

1. Exhibit A, together with the other exhibits in Appellee's Appendix serve to explain matters which relate to appellant's present claim for relief. The Court of Appeals may take notice of these records of proceedings in the state and federal courts which relate to appellant's claim for relief. See, Lambert v. Conrad, 308 F.2d 571 (9th Cir. 1962); St. Paul Fire and Marine Insurance Company v. Cunningham, 257 F.2d 731, 732 (9th Cir. 1958); United States ex rel. Pavloc v. Chairman of Board of Parole, 81 F.Supp. 592, 593 (W.D.Pa. 1948), aff'd on opinion below, 175 F.2d 780 (3rd Cir. 1949) (cited with approval in Stiltner v. Rhay, 322 F.2d 314, 316 n. 6 (9th Cir. 1963).

by the public defender. A certified copy of this judgment and order of commitment is annexed hereto in the Appendix and is "EXHIBIT B."[2/]

On December 3, 1963, appellant was convicted in the Superior Court for the City and County of San Francisco of violation of California Penal Code section 211 and sentenced to the state prison for the term prescribed by law, the sentence to run concurrently with any prior incompleted sentences. This conviction followed appellant's plea of guilty at which time he appeared without counsel. A certified copy of this judgment and order of commitment is annexed hereto in the Appendix and is "EXHIBIT C."[3/]

On July 23, 1964, appellant's application for habeas corpus, which attacked the validity of his 1963 conviction and present custody thereunder, was summarily denied by the Marin County Superior Court (CT 10).

On August 12, 1964, appellant's application for habeas corpus, which attacked the 1963 conviction, was denied by the United States District Court for the Northern District of California, Misc. No. 1038, because appellant had failed to exhaust his then available state remedies. A copy of the District Court's order in this matter is

---

2. See Footnote 1, supra.

3. See Footnote 1, supra.

annexed hereto in the Appendix and is "EXHIBIT D."[4/]

On October 28, 1964, appellant's application for habeas corpus which also attacked his 1963 conviction, was denied by the California Supreme Court, Crim. No. 8188, (CT 10). A copy of this petition to the California Supreme Court is annexed hereto in the Appendix and is "EXHIBIT E."[5/] This petition does not challenge the validity of the 1963 conviction on the grounds that appellant was denied the right to counsel at trial.

On December 29, 1964, appellant's petition for habeas corpus, attacking his 1963 conviction, was denied by the United States District Court for the Northern District of California, Misc. No. 1099 (CT 10).

On July 29, 1965, the United States District Court for the Northern District of California denied appellant's petition for habeas corpus which also attacked his 1963 conviction (CT 23). The petition attacked that conviction on the grounds that appellant was denied counsel during trial (CT 5-6). The District Court denied the petition because the grounds set forth therein were also set forth in the petition which was denied on December 29, 1964, by

---

4. See Footnote 1, supra.

5. See Footnote 1, supra. The Court of Appeals may take notice of this prior state court petition. Murry v. Louisiana, 347 F.2d 825 (5th Cir. 1965).

the same court. The District Court cited Title 28, United States Code section 2244 (CT 23).

Appellant's application to the District Court for a certificate of probable cause to appeal was denied on December 1, 1965. The District Court denied this application because appellant's record indicated that he had been convicted of second degree robbery in 1953 and again in 1957 and appellant failed to show that sentences on these prior convictions had expired. The District Court's ruling was expressly based on McNally v. Hill, 293 U.S. 131 (1934) (CT 30).

After rehearing, a certificate of probable cause to appeal, and leave to appeal in forma pauperis were granted by the District Court on May 17, 1966 (CT 43).

SUMMARY OF APPELLEE'S ARGUMENT

I. Appellant has failed to exhaust his presently available state remedies because his petition to the California Supreme Court, which attacked the 1963 conviction, failed to raise the contention that he was denied counsel at trial.

II. Appellant is in custody under each of his three convictions and would, therefore, not be entitled to immediate release even were a writ of habeas corpus to issue.

ARGUMENT

I

APPELLANT HAS FAILED TO EXHAUST HIS PRESENTLY AVAILABLE STATE REMEDIES BECAUSE HIS PETITION TO THE CALIFORNIA SUPREME COURT, WHICH ATTACKED THE 1963 CONVICTION, FAILED TO RAISE THE CONTENTION THAT HE WAS DENIED COUNSEL AT TRIAL.

After the United States District Court for the Northern District of California denied appellant's petition for habeas corpus on August 12, 1964, for failure to exhaust state remedies (EXHIBIT D), appellant petitioned the California Supreme Court for habeas corpus. A copy of this petition is annexed hereto and is "EXHIBIT E."[6/]

This petition does not challenge appellant's 1963 conviction on the basis of denial of the right to counsel at trial. Moreover, in his present petition appellant stated that no appeal was taken from the 1963 conviction (CT 2), and did not indicate having made any petition for habeas corpus to the California Supreme Court other than the petition in Crim. No. 8188 discussed above.

This being so, denial by the District Court of his present petition was proper because appellant has failed to give the California state courts an opportunity

---

6. The Court of Appeals may notice this prior petition to a state court. See, Footnote 1, supra; Murray v. Louisiana, 347 F.2d 825, 827 (5th Cir. 1965).

to rule on his contention that he was denied counsel at trial.[7/] 28 U.S.C. § 2254; Rose v. Dickson, 327 F.2d 27, (9th Cir. 1964).

II

APPELLANT IS IN CUSTODY UNDER EACH OF HIS THREE CONVICTIONS AND WOULD, THEREFORE, NOT BE ENTITLED TO IMMEDIATE RELEASE EVEN WERE A WRIT OF HABEAS CORPUS TO ISSUE.

Appellant's record shows that on three separate occasions he was convicted by the California courts of second degree robbery (EXHIBITS A, B, C). Because appellant has failed to show or claim that he has completed his imprisonment under his unchallenged convictions of 1953 and 1957, the District Court's denial of his petition for habeas corpus was proper.[8/] King v. California, 356 F.2d 950 (9th Cir. 1966); Collins v. Klinger, 353 F.2d 731 (9th Cir. 1965). Appellant's record indicates that he is presently serving a life sentence under each of his three convictions. A copy of appellant's sentence data

---

7. The Court of Appeals may review appellant's compliance with Title 28, United States Code section 2254 even if the District Court did not consider the point because whether that section has been satisfied is a question of law and not one of fact. Rose v. Dickson, 327 F.2d 27, 28 (9th Cir. 1964).

8. The Court of Appeals may consider this point even though the District Court did not consider it as such when it denied appellant's petition. See Wells v. People of State of California, 352 F.2d 439 (9th Cir. 1965).

is affixed hereto in the Appendix and is "EXHIBIT F."[9] Therefore, even were appellant to successfully attack his 1963 conviction and sentence and a writ of habeas corpus to issue, he would not be entitled to immediate release because he would remain in custody under his prior two convictions.

Under these circumstances, appellant is not entitled to a writ of habeas corpus and the District Court's denial of the writ was proper. McNally v. Hill, 293 U.S. 131 (1934).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court denying the petition for writ of habeas corpus should be affirmed.

DATED: September 21, 1966

THOMAS C. LYNCH, Attorney General
of the State of California
ROBERT R. GRANUCCI
Deputy Attorney General

Karl S. Mayer

KARL S. MAYER
Deputy Attorney General

Attorneys for Appellee.

---

9. The Court of Appeals may notice this record of actions of the California Adult Authority. See Footnote 1, supra, especially United States ex rel. Pavloc v. Chairman of Board of Parole, 81 F.Supp. 592, 593 (W.D.Pa. 1948), aff'd on opinion below, 175 F.2d 780 (3rd Cir. 1949) (cited with approval in Stiltner v. Rhay, 322 F.2d 314, 316 n. 6 (9th Cir. 1963)).

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

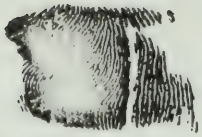
DATED: San Francisco, California

September 21, 1966

Karl S. Mayer

KARL S. MAYER
Deputy Attorney General
of the State of California

A P P E N D I X



A-23752

DEPT. NO. Twelve CASE NO. 48202

In the Superior Court of the State of California

IN AND FOR THE City and COUNTY OF San Francisco.

ABSTRACT OF JUDGMENT
(Commitment to State Prison as provided by Penal Code Section 1213.5)

The People of the State of California,

vs.

VIRGIL LEE SMITH, Defendant.

Hon. H. A. van der Zee (Judge of Superior Court)

Alton C. Lawless, Asst. (District Attorney)

Joseph I. McNamara, Asst. Public Defender (Counsel for Defendant)

This certifies that on the 24th day of February, 19 53 judgment of conviction of the above-named defendant was entered as follows:

In Case No. 48202 Count No. he was convicted by Court (Court or Jury); on his plea of not Guilty (guilty, not guilty, former conviction or acquittal, once in jeopardy, not guilty by reason of insanity); of the crime of Felony, towit: ROBBERY, SECOND (2nd) DEGREE;

(designation of crime and degree if any, including fact that it constitutes a second or subsequent conviction of same offense if that affects the sentence and if under Section 209 of the Penal Code whether victim suffered bodily harm);

in violation of SECTION 211 OF PENAL CODE; (reference to Code or Statute, including Section and Sub-section);

with prior convictions charged and proved or admitted as follows:

DATE	COUNTY AND STATE	CRIME	DISPOSITION
THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE ATTEST: L. E. WILSON, WARDEN CALIFORNIA STATE PRISON By ... RECORDS OFFICER (OFFICIAL SEAL)			

Defendant was not (was) or (was not) charged and admitted being, or was found to have been armed with a deadly weapon at the time of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections 969c and 3024.

EXHIBIT A

Defendant ..... adjudged a habitual criminal within the meaning of Sub-division..... .....of
(was) or (was not) (a) or (b)

Section 644 of the Penal Code; and the defendant a habitual criminal in accordance with Sub-division (c)
(is) or (is not)
of that Section.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law, and that he be remanded to the Sheriff of the City and County of San Francisco and by him delivered to the Director of Corrections of the State of California at the place hereinafter designated.

It is ordered that sentences shall be served in respect to one another as follows..... .....
(Note whether concurrent or consecutive as to each count):

.....

.....

.....

and in respect to any prior incompleted sentence (s) as follows: .....
(Note whether concurrent or consecutive as to all incomplete sentences from other jurisdictions):

.....

.....

.....

To the Sheriff of the City and County of San Francisco and to the Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above-named defendant into the custody of the Director of Corrections at SAN QUENTIN, CALIFORNIA at your earliest convenience.

Witness my hand and seal of said court

this 24th day of FEBRUARY, 1953

MARTIN MONGAN Clerk

by ..... Deputy

State of California,
City and County of San Francisco } ss.

I do hereby certify the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

Attest my hand and seal of the said Superior Court this 24th day of February, 19 53

MARTIN MONGAN
County Clerk and Ex-officio Clerk of the Superior Court of the State of California in and for the City and County of San Francisco

The Honorable: .....
Judge of the Superior Court of the State of California, in and for the City and County of San Francisco

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach a minute order reciting the fact and imposing sentence or ordering a suspended sentence into effect.

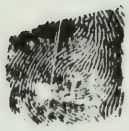
DEL. BY ..... AT ..... RECEIVED BY ..... SEAL DEC 23 1957

314.

ENTERED- FEBRUARY 24th,1953, MINUTE BOOK, DEPT.NO.12, VOL.180, PAGE ~~xxx~~

[illegible]

[illegible] CENTER



DEPT. No. 1 CASE NO. 13485

In the Superior Court of the State of California

IN AND FOR THE COUNTY OF San Joaquin

ABSTRACT OF JUDGMENT

(Commitment to State Prison as provided by Penal Code Section 1213.5)

The People of the State of California,

vs

VIRGIL SMITH, Defendant.

Hon. R. M. QUINE (Judge of Superior Court)

William F. Roberts Deputy (District Attorney)

Public Defender (Counsel for Defendant)

This certifies that on the 21st day of October, 19 57 judgment of conviction of the above-named defendant was entered as follows:

In Case No. 13485 Count No. he was convicted by Court (Court or Jury); on his plea of "Guilty (guilty, not guilty, former conviction or acquittal, once in jeopardy, not guilty by reason of insanity); of the crime of Robbery of the Second Degree, a Felony

(designation of crime and degree, if any, including fact that it constitutes a second or subsequent conviction of same offense if that affects the sentence and if under Section 209 of the Penal Code whether victim suffered bodily harm)

in violation of Section 211 of the Penal Code of the State of California (reference to Code or Statute, including Section and Sub-section);

with prior convictions charged and proved or admitted as follows:

DATE	COUNTY AND STATE	CRIME	DISPOSITION

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE
ATTEST:
L. E. WILSON, WARDEN
CALIFORNIA STATE PRISON
AT SAN QUENTIN
BY [illegible]
RECORDS OFFICER
(AFFIX SEAL)

Defendant was not (was) or (was not) charged and admitted being, or was found to have been armed with a deadly weapon at the time of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections 969c and 3024.

EXHIBIT B

Defendant ..... (was) or (was not) adjudged a habitual criminal within the meaning of Sub-division ..... (a) or (b) of Section 644 of the Penal Code; and the defendant ..... (is) or (is not) a habitual criminal in accordance with Sub-division (c) of that Section.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law, and that he be remanded to the Sheriff of the ..... County of San Joaquin and by him delivered to the Director of Corrections of the State of California at the place hereinafter designated.

It is ordered that sentences shall be served in respect to one another as follows ..... (Note whether concurrent or consecutive as to each count);

and in respect to any prior incompleted sentence (s) as follows: ..... (NOTE whether concurrent or consecutive as to all incomplete sentences from other jurisdictions);

Sentence herein pronounced is to run consecutively with any unexpired sentence to which the defendant may be subject.

To the Sheriff of the ..... County of San Joaquin and to the Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above-named defendant into the custody of the Director of Corrections at the California Medical Facility at Vacaville, ~~xxxxxxxxxxxxxxxx~~ State of California, at your earliest convenience.

Witness my hand and seal of said court

this 21st day of October, 1957

R. E. GRAHAM Clerk

by Edward Ludwig Deputy

SEAL

State of California, } ss.
..... County of San Joaquin

I do hereby certify the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

Attest my hand and seal of the said Superior Court this 21st day of October 19 57

R. E. GRAHAM, Clerk; By: Edward Ludwig, Deputy
County Clerk and Ex-officio Clerk of the Superior Court of the State of California in and for the County of San Joaquin

The Honorable: .....

Judge of the Superior Court of the State of California, in and for the County of San Joaquin

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach a minute order reciting the fact and imposing sentence or ordering a suspended sentence into effect.

DEL. BY ..... AT ..... M. DEC 9 1957 RECEIVED BY

THE ANNEXED INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE.
ATTEST:
CERTIFIED

DEC 5 1963

MARTIN MONGAN, COUNTY CLERK OF SAN FRANCISCO, AND EX-OFFICIO CLERK OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO.
BY _____ DEPUTY

RECEIVED
CALIF. MEDICAL FACILITY
DEC 6 2 31 PM '63
GUIDANCE CENTER

DEC 5 1963
MARTIN MONGAN, CLERK
BY J. FITZPATRICK Deputy Clerk

DEPT. No. 12 CASE No. 62292

In the Superior Court of the State of California

IN AND FOR THE City & COUNTY OF San Francisco

ABSTRACT OF JUDGMENT

(Commitment to State Prison as provided by Penal Code Section 1213.5)

The People of the State of California,

vs

VIRGIL LEE SMITH, Defendant.

Hon. Harry J. Neuberth (Judge of Superior Court)

William Auslen Asst. (District Attorney)

Propria Personna (Counsel for Defendant)

This certifies that on the 3rd day of December, 19 63 judgment of conviction of the above-named defendant was entered as follows:

In Case No. 62292 Count No. one he was convicted by court (Court or Jury); on his plea of Guilty (guilty, not guilty, former conviction or acquital, once in jeopardy, not guilty by reason of insanity); of the crime of felony, to-wit: Robbery, second degree,

(designation of crime and degree, if any, including the fact that it constitutes a second or subsequent conviction of same offense if that affects the sentence and if under Section 209 of the Penal Code whether victim suffered bodily harm)

in violation of section 211 Penal Code,

(reference to Code or Statute, including Section and Sub-Section);

with prior convictions charged and proved or admitted as follows: XXXXXXXXXXXXXXXX dismissed at time of plea.

DATE	COUNTY AND STATE	CRIME	DISPOSITION

Defendant was not XXXXXXXXXXXXXXXX (was) or (was not) charged and admitted being, or was found to have been armed with a deadly weapon at the time of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections 969c and 3024.

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.
ATTEST:
L. E. WILLIAMS, WARDEN
CALIF. MEDICAL FACILITY
AT VACAVILLE
BY _____ RECORDS OFFICER

(AFFIX SEAL)

GA-76 (34436)

EXHIBIT C

Defendant was not (was) or (was not) adjudged a habitual criminal within the meaning of Sub-division ..... (a) or (b) of Section 644 of the Penal Code; and the defendant ..... (is) or (is not) a habitual criminal in accordance with Sub-division (c) of that Section

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law, and that he be remanded to the Sheriff of the City & County of San Francisco and by him delivered to the Director of Corrections of the State of California at the place hereinafter designated.

It is ordered that sentences shall be served in respect to one another as follows: .....
(Note whether concurrent or consecutive as to each count)

and in respect to any prior incompleted sentence (s) as follows: .....
(NOTE whether concurrent or consecutive as to all incomplete sentences from other jurisdictions):

to run concurrently.

To the Sheriff of the City & County of San Francisco and to the Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above-named defendant into the custody of the Director of Corrections at Vacaville, California, at your earliest convenience

Witness my hand and seal of said court

this 3rd day of December, 1963

Martin Mongan ..... Clerk

by J. FITZPATRICK ..... Deputy

SEAL

State of California, County of San Francisco } City &

I do hereby certify the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

attest my hand and seal of the said Superior Court this 3rd day of December 19 63

Martin Mongan

County Clerk and Ex-Officio Clerk of the Superior Court of California in and for the City & County of San Francisco

The Honorable .....

Judge of the Superior Court of the State of California in and for the City & County of San Francisco

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach a minute order reciting the fact and imposing sentence or ordering a suspended sentence into effect.

Entered Dec. 3, 1963, vol. 207-page 471.

Execution stayed until December 5, 1963.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

VIRGIL LEE SMITH,

Petitioner,

vs.

STATE OF CALIFORNIA, et al.,

Respondents.

Misc 1038

ORDER DENYING LEAVE TO PROCEED IN FORMA PAUPERIS AND DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, a prisoner of the State of California at the San Quentin Prison, seeks to file in forma pauperis a petition for writ of habeas corpus.

The petition does not show that petitioner has exhausted his remedies in the state courts. Such a showing is prerequisite to his petition to this court. 28 U.S.C. §2254.

It is ordered that leave to proceed in forma pauperis be, and the same hereby is, denied and the petition for writ of habeas corpus is dismissed.

Dated: August 28, 1964.

STANLEY A. WEIGEL
Judge

EXHIBIT D

CRIMINAL No._____.

BEFORE THE

SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE APPLICATION

OF

VIRGIL LEE SMITH,

FOR A WRIT OF HABEAS CORPUS,

(VS)

WALTER DUNBAR, DIRECTOR OF CORRECTIONS,
STATE OF CALIFORNIA; LAWRENCE E. WILSON,
WARDEN OF THE CALIFORNIA STATE PRISON AT
SAN QUENTIN, STATE OF CALIFORNIA.

PETITION FOR WRIT OF HABEAS CORPUS

AND

POINTS AND AUTHORITIES.

VIRGIL LEE SMITH, PRO.PER.
BOX # A-23952-B
TAMAL, CALIFORNIA

EXHIBIT E

BEFORE THE

SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE APPLICATION OF VIRGIL LEE SMITH, FOR A WRIT OF HABEAS CORPUS, (VS) WALTER DUNBAR, DIRECTOR OF CORRECTIONS OF THE STATE OF CALIFORNIA; LAWRENCE E. WILSON, WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, CALIFORNIA.	CRIM.#_____. PETITION FOR WRIT OF HABEAS CORPUS.

TO: THE HONORABLE SUPREME COURT OF THE STATE OF CALIFORNIA;

THE PETITION OF VIRGIL LEE SMITH RESPECTFULLY SHOWS:

(ONE)

That petitioner is making this petition on behalf of Virgil Lee Smith the applicant in the above captioned matter; that he is without funds of any sort to pay the filing fee if any, and cost/ and prays the Court will allow him to proceed in forma pauperis at this time.

(TWO)

That said Virgil Lee Smith is imprisoned and restrained of his liberty at the state penitentiary at San Quentin, Marin County, State of California by Lawrence E. Wilson, Warden thereof, at the direction of Walter Dunbar Director of California Department of Corrections.

(THREE)

THAT the imprisonment of said Virgil Lee Smith is illegal and said illegality thereof consists in this, to wit:

A

That on December 5, 1963, in Department # 12, Case # 62292, in the Superior Court of the State of California in and for the County of San Francisco, petitioner was committed to State Prison as provided by Penal Code section 1213.5 for violation of section 211 P.C., with all prior charges dismissed, wherein the Court ordered that such sentence shall be served in respect with one another as follows: and in respect to any prior incompleted sentece (s) as follows: to run concurrently. "by the order of Judge H.J.Heubarth."

B

That on February 10, 1964 petitioner was given a copy of certification of Adult Authority Action that took place at San Quentin Prison after a hearing on parole violation cahrges: (WMT) Pled Guilty. 12-6-63. Revoked, Denied, Place on December 1966 Calendar. Page 313 Vol.41, Dated: February 19, 1964.

C

That petitioner was convicted September 22, 1957 in the Superior Court of the State of California, Stockton California for violation of section 211 P.C. and sentenced to serve a term in State prison as prescribed by law. On or about June 20, 1962 the Adult Authority heard the case and fixed petitioner's term at seven (7) years and at this date petitioner had been detained by the Adult Authority for a period of some four (4) years and seven (7) months.

D

The Adult Authority drew up a contract for the petitioner, to wit: That at a later date in 1962 petitioner could be released on parole

to serve the remaining two years and some months on said seven year term on parole and thereby complete his sentence on seven (7) years which was the lawful period for which the Adult Authority could detain the petitioner.

E

That on December 10, 1963 petitioner violated the contract of the parole and was given a hearing wherein the Adult Authority redetermined his prison term and denied petitioner any consideration for a period of three years which will cause the petitioner to serve three (3) years over and beyond the set and fixed term of seven (7) years.

CONTENTIONS

I

It is petitioner's contentions that the term of sentence in his case was lawfully seven (7) years as fixed by the determination of the Board and must be res judicata and cannot at a later date be raised under the law.

2

Petitioner submits that the Adult Authority has express power to determine and/or redetermine a prisoners term of sentence (3020 P.C.) but once the term has been fixed (determined) as in petitioner's case which was seven (7) years, to start 10/22/57, which is now in the year of 9/64 surely 10/22/1957 calculated with 10/22/64 equals seven (7) years, and "they (the board) may merely modify in any redetermination of such term and not augment.

(A) To assume the converse would be to afford the Adult Authority greater power than any Court in the land and petitioner seriously doubts this to be legislative intent.

(B) The case of In re Gomez, 27 C.2d 637 supports petitioner's position viz. "the board by a subsequent declaration could not breath life into a total term of imprisonment which had come to an end."

(C) The rule is subject to limitations that in criminal matters and cases a sentence already partially served cannot be increased.

Thortens Cr.L.and Pr. 9th Ed. Section 913;

U.S. v Pehz 232 U.S. 224, 336-337, 51 S.Ct.113, 75 L.Ed. 354;

Ex parte Lange 18 Wall 163, 21 L.Ed. 948.

(D) To increase petitioner's sentence after he had served part of the seven (7) year term subjected him to double punishment for the same offense which he had committed in 1957, and was sentenced to serve seven (7) years for the offense, and was sentenced to three more years by raising his term by three (3) years making him have to serve ten (10) years instead of seven (7) years. This is in violation of the Fifth Amendment to the Constitution, which provides that no person shall be subjected for the same offense to be twice put in jeopardy of life or limb.

By their fixing of petitioner's term in December 1962 to be for the period between 12/6/63 to 12/1966, the board has exercised its function a second time. A sentence may be reduced after it has been partially served but it may not be augmented. It is not a jurisdictional but a constitutional question. Larson v Boucher, 78 LT. 433 at 435.

By the fixing of petitioner's term in (1962, 6/20/62 on or about) at seven (7) years the board has exercised its function under Penal Code section 3020 et.seq., and therefore Penal Code sec. 2940 should operate for petitioner to discharge his term, 12-6-64.

Petitioner avers that parole violation is not a crime, but is a disregard of official rules and regulations. Otherwise, parole violators would appear in court for judicial proceedings in legal orderly manner. As such, parole violations do not affect the original sentence nor can it interfere with his constructively being a prisoner of the Department of Corrections under sec.2940 P.C. whether on

parole of incarcerated.

The Adult Authority is an agency (board) deriving its powers from the Constitution fr California, and is duly a constitutionally constituted board under administrative law.

Article 10, section 1, formerly 7, Cal, Const.

Petitioner asserts thatby virtue of the foregoing article the Adult Authority is affected by administrative law and its actions become res judicata.

See: Cal. Jur. 2d Administrative Law, sec. 26, 151-152.,

McK. Dig. Adm. Law. sec. 11, 110;

the same as decisions of a competent court are res judicata.

The Adult Authority has exceeded its jurisdiction in detaining petitioner beyond his lawful discharge date of 12/6/63 or 12/6/64, The records show not term to be finished 12/6/63, but there is no question that 10/6/57 equals seven (7) years. This violates petitioner's rights both statutory and constitutional.

WHEREFORE, it is urged that the writ of habeas corpus as prayed for in the petition be issued, directed to the said Walter Dunbar, Director of Corrections, State of California, and Laurence E. Wilson, Warden of the State Prison at San Quentin, commanding them to have the body of said Virgil Lee Smith before Your Honor at the time and place therein to be specified, to do and receive what shall then and there be considered by Your Honor, concerning said Virgil Lee Smith, together with the time and cause of his detention, and said writ, and that he, said Virgil Lee Smith may be restored to his liberty.

September 4 ?

Dated this 9 day of 4 1964.

Virgil Lee Smith
VIRGIL LEE SMITH, PRO.PER.

STATE OF CALIFORNIA)
COUNTY OF MARIN) SS: VERIFICATION OF PETITION FOR HABEAS CORPUS

I, VIRGIL LEE SMITH, UNDER PENALTY OF PERJURY DECLARE:

That I am the petitioner in the foregoing action;

That I have read the petition for habeas corpus and know the contents thereof; that the contents thereof are true of my own knowledge and beliefs except as to those matters therein alleged on information and belief and as to those matters I believe them to be true also.

Executed this Sep of 11 1964, and respectfully submitted,

Virgil Lee Smith

VIRGIL LEE SMITH, PETITIONER PRO.PER.
P.O.BOX A23952-B
TAMAL, CALIFORNIA

[illegible]

"The term of sentence, as fixed (determined) by the Adult Authority (board), must be considered to be res judicata and cannot at a later date be raised under the law.

Statewide administrative bodies consist of agencies that do, and those that do not, derive their powers from the Constitution. Res judicata applies to the former and the latter. The Adult Authority is an agency (board) deriving its power from the Constitution of California.

The legislature has the Constitutional power to determine what officers, agencies or boards shall exercise the powers now exercised by the Adult Authority and the scope of such powers, thereby making the Adult Authority Bd and a duly constitutionally constituted board under administrative law.

Article ten (10) section one (1) formally seven (7), California Constitution, says: "The legislature may provide for the establishment, government, charge and superintendance of all institutions for all persons convicted of felonies."

For these purposes, the legislature may delegate the government, charge an d superintendence of such institutions to any public ~~[illegible]~~ government agency or agencies, officers, boards, whether now existing or hereafter created by it, any such agencies, officers or boards shall have such powers, perform such duties and exercise such functions in respect to other reformatory or penal matters, as the legislature may prescribe."

Petitioner here asserts that by virtue of the foregoing Article ten (10) section one (1), the decisions determined by the Adult Authority, are affected by administrative law and become res judicata. See: Cal.Jur.2d Administrative Law, section 26,151-152.

Ma. Dig. Administrative Law, sec.11, 110.
In the same way as decisions of a competent court are res judicata.

Petitioner submits that the Adult Authority has express power to determine and/or redetermine a prisoner's sentence (3020 P.C.), but once the term has been fixed (determined) they (the board) may merely modify in any redetermination of such term, not augment. To assume the co nverse would be to afford the Adult Authority greater judiciary power than any court in the land and the petitioner seriously doubts that this was the intent of the legislature.

The case of In re Conan 27 Cal 2d 637, supports petitioner's position. viz.,"the board, by a subsequent declaration could not breath life into a total term of imprisonment which had come to an end."

Further, "the rule in subject to limitations that in criminal cases a sentence already partially served cannot be increased."

Whartonl's Cr.L.Pr. 9th ed. section 913;

U.S. v. Benz 282 U.S. 304, 306-307, 51 S.Ct. 113,75 L.Ed.354;

Ex parte Lange 18 Wall 163, 21 L.Ed. 548.

"To increase the sentence after it had been served in part subjects the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall be subjected for the same offense to be twice put in jeopardy of life or limb." "A sentence may be reduced after it has been partially served but it may not be augmented. It is not a jurisdictional but a constitutional question."

Harmon v Bruckner, 78 Ct. 433, 435.

By their fixing of petitioner's term in 1962 to the amounty of seven (7) years the board has exercised its function under Penal Code section 3020 et seq., and therefore Penal Code sec.2940 should operate for petitioner to discharge his term 1964.

Petitioner here cites the case [illegible], (1945) 25 C.2d. 799, (154 P.2d. 857) at p. 804 the Court speaking through Mr.Justice Schauer (with all other Justices concurring) said:

> "The discussion by Judge Charles W. Fricke, acting protempore for the District Court of Appeal, in Peo v Hayes, 1935, 9 Cal App 2d 157, 160, 49 P.2d. 288, cites the statute the law subject to limitations reasonably implied by the [illegible] cited, as said in the case of In re [illegible] 193 193 C.387 (254 P. 492); In re [illegible], 177 C. 699 (171 P.958), and In re Daniels, 166 C.A.43 (288 P.1109), that when a sentence is imposed under the indeterminate sentence law (Pen.1168) the term of imprisonment is the maximum provided by law until action is taken by the Board of Prison Terms and Paroles (Where the Adult Authority Dept.of Corrections is the successor to Board of Prison Terms and Paroles, see: In re [illegible] (1945) 25 C.2d 794 at p.797, 154 P.2d 673) which may and is required to fix the period between the maximum and minimum penalties and when so fixed the term of imprisonment is the period fixed by order of that board."

Petitioner avers that parole violation is not a crime, but is a disregard of official rules and regulations. Otherwise Parole Violators would appear in Court for judicial proceedings in legal orderly manner, as parole violation does not affect the original sentence nor can it interfere with his Constructively being a prisoner of the Department of Corrections under Penal Code section 2930, whether on parole or incarcerated.

The Adult Authority has exceeded its jurisdiction in detaining petitioner beyond his lawful discharge date which violates his rights, both Statutory and Constitutional.

[illegible], it is urged that the writ of habeas corpus as prayed for in the petition be issued, granted as law, justice and order would require.

Respectfully submitted,

This 2 day of 4 1964.

Virgil Lee Smith
VIRGIL LEE SMITH, P.O.W.R.
P.O. BOX A-[illegible]
TAFT, CALIFORNIA

SUMMARY OF SENTENCE DATA

	Credits Forfeited	Credits Restored	Additional Credits	Discharge Date	Parole Effective Date
CRIME: Robb. 2nd (211-PC)					
TERM: 1-Life					
COUNTY: San Francisco					
County Case No.: 48202					
JUDGE: H.A. van der Zee (CC)					
2-24-53 RGC S.Q.					
6-24-53 Trans to Soledad					
8-10-54 ACT & FTC 1 Cal Yr. Denied.					
SEP 8 1954 Trans to NC#5 Miramonte					
FEB 14 1955 Rec'd from NC#5 Miramonte (Medical)					
AUG 8 1955 TFA 5½ yrs. Granted					
last 2 yrs. on parole.				~~8-24-57~~	~~Parole~~
8-25-56 trans. to M.P. - pre-rel.					
8-27-56 paroled from Sol.					
Bas to report direct to Sacto PO				1-4-57	
10-22-57 PV WNT RECD RGC CMF					
11-15-57 PAR SUS TRFA MAX				life	
DEC 23 1957 RECEIVED AT FOLSOM					
FEB 18 1958 PG TO CTS All PNG TO CTS —					
FG OF CTS — FNG OF CTS —					
CTS DISM — PAR REV Denied					
PLACE ON 10/60					
4-29-58 Rec'd SQ					
10-10-60 Released					
1-26-61 Assigned CC 13				SEE	
7-9-61 Ret. S.Q (Board)				A.	
7-10-61 TRFA - 5 yrs TFA - 7 yrs				TERM	
9 S WPT - Granted 2 yrs					
Induct on Parole				2-24-8	5-24-6
7-10-61 To CC 13					
9-7-61 Ret. S.Q (Dental-Inst Conv.)					
11-30-61 NOTED					
6-20-62 Paroled San Francisco Dist. & C.					
12-6-63 PV WNT REC'D RGC CMF				LIFE	
12-18-63 Parole Canceled					
2-3-64 Rec'd SQ					
2-10-64 PG. Revoked. Denied.					
Discw 12-66 cal.					

EXHIBIT F

A-23952 SMITH, Virgil Lee
Summary of Sentence Data

CTS = 3-6-3

SUMMARY OF SENTENCE DATA

	Credits Forfeited	Credits Restored	Additional Credits	Discharge Date	Parole Effective Date
CRIME: Robb 2nd, CS WPT (211(213)PC					
SENTENCE: 1-Life, CS WPT					
COUNTY: San Joaquin					
County Case No. 13485					
JUDGE: R. M. Dunne (PG)					
~~This term begins: 2-24-57~~					
10-22-57 PV WNT REC'D RGC,CMF					
DEC 23 1957 RECEIVED AT FOLSOM					
4-29-58 Rec'd SQ					
10-10-60 - Released					
1-26-61 - Assigned CC 13					
4-9-61 - Ret. S.Q (Board)					
7-10-61 - TFA - 7yrs Ss wpt - Granted 2yrs Prison on Parole				2-24-65	5-24-62
7-10 61 TO CC 13					
9-7-61 Ret. S.Q (Dental + Inst Conv.)					
11-30-61 - NOTED					
6-20-62 - Tried San Francisco Dist. Ct.					
12-6-63 PV WNT REC'D RGC CMF					
12-18-63 Parole Cancelled				LIFE	
2-3-64 Rec'd SQ					

SUMMARY OF SENTENCE DATA

		Credits Forfeited	Restored Credits	Additional Credits	Discharge Date	Effective Parole Date
CRIME:	Robb 2nd CC WPT					
	211 PC					
TERM:	1-Life CC WPT					
COUNTY:	San Francisco					
County Case No.:	62292					
JUDGE:	H.J. Neubarth					
12-6-63 PV WNT REC'D RGC-CMF						
2-3-64 Rec'd SQ						

A-23952-B SMITH, Virgil Lee
Summary of Sentence Data

NO. 21137

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENITO MARTINEZ JUVERA and
PATRICK RAMIREZ CEDILLO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
JAMES E. SHEKOYAN,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America

NO. 21137

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENITO MARTINEZ JUVERA and
PATRICK RAMIREZ CEDILLO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
JAMES E. SHEKOYAN,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America

TOPICAL INDEX

TABLE OF AUTHORITIES

Constitution

Statutes

Rules

Misc.

NO. 21137

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENITO MARTINEZ JUVERA and
PATRICK RAMIREZ CEDILLO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On December 29, 1965, a one-count indictment was returned against the appellants, Benito Martinez Juvera and Patrick Ramirez Cedillo, by the Federal Grand Jury for the Southern District of California, Central Division [C. T. 2]. 1/

The indictment charged the appellants with the violation of Federal laws relating to unlawful possession of an unregistered firearm (sawed-off shotgun) [C. T. 2].

1/ "C. T." refers to Clerk's Transcript.

Both appellants were convicted by a jury on February 11, 1966 [C. T. 45 and 46].

On April 1, 1966, appellant Cedillo was sentenced to the custody of the Attorney General for five years, subject to parole as provided in Title 18, United States Code, Section 4208(a)(2) [C. T. 55]. The District Court ordered that this sentence run consecutive to the sentence against appellant Cedillo imposed on June 15, 1964, in Criminal Case Number 33601-CRC [C. T. 57].

On April 18, 1966, appellant Juvera was sentenced to the custody of the Attorney General for five years, with opportunity for parole as provided in Title 18, United States Code, Section 4208(a)(2). This sentence was ordered to run consecutive to the sentence against appellant Juvera imposed on July 1, 1964 in Criminal Case Number 33609-CD [C. T. 57-A].

The jurisdiction of the District Court was predicated on Title 18, United States Code, Section 3231 and Title 26, United States Code, Section 5851. This Court's jurisdiction is based upon Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Section 5851 of Title 26, United States Code, provides in pertinent part as follows:

> "It shall be unlawful for any person . . . to possess any firearm which has not been registered

as required by Section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury."

Section 5841 of Title 26, United States Code, provides as follows:

"Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and the place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with."

Section 5848 of Title 26, United States Code, provides in pertinent part as follows:

"For purposes of this chapter - (1) The term 'firearm' means a shotgun having a barrel or barrels of less than 18 inches in length . . . or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches. . . ."

III

STATEMENT OF THE CASE

The appellants were indicted on December 29, 1965, by the Federal Grant Jury for the Southern District of California, Central Division. The one-count indictment charged the appellants with the violation of Federal laws relating to the unlawful possession of an unregistered firearm [C. T. 2].

Trial by jury was held on February 11, 1966, before the Honorable Roger D. Foley, Jr., United States District Judge, at which time both appellants were convicted [C. T. 45 and 46].

Appellant Cedillo was sentenced on April 1, 1966, and appellant Juvera was sentenced on April 18, 1966, as previously indicated in the Jurisdictional Statement.

Appellant Cedillo filed a notice of appeal on April 20, 1966 [C. T. 64]. Appellant Juvera filed a timely notice of appeal on April 19, 1966 [C. T. 59].

IV

QUESTIONS PRESENTED

A. IS SECTION 5851 OF TITLE 26 OF THE UNITED STATES CODE UNCONSTITUTIONAL AND IN VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

B. WERE THE STATEMENTS MADE BY THE PROSECUTING ATTORNEY IN HIS CLOSING ARGUMENT PREJUDICIAL SUCH AS WOULD JUSTIFY A REVERSAL?

C. WAS THE SHOTGUN, GOVERNMENT EXHIBIT NUMBER ONE, WHICH WAS ADMITTED INTO EVIDENCE, THE PRODUCT OF AN ILLEGAL SEARCH AND SEIZURE?

D. WAS THERE ERROR IN ADMITTING INTO EVIDENCE THE OBJECTS WHICH WERE DISCOVERED UPON THE SEARCH OF THE VEHICLE?

E. WAS THERE SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT CEDILLO HAD EITHER ACTUAL OR CONSTRUCTIVE, JOINT OR SINGLE, POSSESSION OF THE SHOTGUN?

F. DID THE GOVERNMENT PROVE BEYOND A REASONABLE DOUBT THAT THE SHOTGUN IN QUESTION WAS NOT REGISTERED UNDER THE NATIONAL FIREARMS ACT?

G. MUST THE GOVERNMENT PROVE THAT THE FIREARM IN QUESTION HAD A SMOOTH BORE?

H. WAS THERE A VIOLATION OF THE APPELLANT'S

CONSTITUTIONAL RIGHT OF DUE PROCESS WHEN THE CLERK IN IMPANELING THE JURY ANNOUNCED THAT THE INDICTMENT CHARGED A CRIME UNDER SECTION 5841 WHEN THE CRIME IN THE INDICTMENT WAS 5851?

I. CAN A PARTY ASSIGN AS ERROR A PORTION OF THE COURT'S INSTRUCTIONS WHERE NO OBJECTION WAS MADE PRIOR TO THE JURY RETIRING TO CONSIDER ITS VERDICT?

J. DOES APPELLANT CEDILLO HAVE STANDING TO APPEAL HIS CONVICTION?

V

STATEMENT OF FACTS

George LaPold, police officer for the City of Alhambra, in response to a radio call which related specific actions taking place at Crawford's Market, proceeded to the market. As he approached the market, LaPold observed a white Chevrolet facing him in front of the market. LaPold observed defendant Juvera sitting behind the steering wheel of the vehicle wearing a charcoal felt hat and dark glasses [R. T. 24]. 2/ Defendant Cedillo was standing beside the passenger side with the passenger door open, facing the officer with what appeared to be a stocking mask about his forehead [R. T. 25].

2/ "R. T." refers to Reporter's Transcript.

As LaPold entered the market, he saw the Chevrolet pull away and he then followed the vehicle. After observing the Chevrolet proceed on the wrong side of the street, LaPold radioed for assistance and then stopped the Chevrolet. The officer approached the driver's side and requested the driver's license and registration of the driver [R. T. 26]. While the driver was looking for the registration, LaPold observed what appeared to be a sawed-off shotgun laying on the floor under the driver's section [R. T. 27].

At this time Hobart R. Taylor, a police officer for the City of Alhambra, arrived on the scene in response to the radio message which related that LaPold needed assistance. Taylor approached the passenger side of the Chevrolet and asked defendant Cedillo to exit the automobile [R. T. 50]. LaPold asked defendant Juvera to exit the automobile [R. T. 27].

LaPold searched Juvera and found two loaded shotgun shells and a partial dental plate [R. T. 28]. Taylor gave Cedillo a "pat down search" and found a pistol [R. T. 51]. Both defendants were then placed under arrest and informed of their rights [R. T. 30]. A search was then made of the vehicle [R. T. 52].

The shotgun was placed on the top of the vehicle. Another fully loaded shotgun shell was in the chamber [R. T. 31]. The following objects were discovered and admitted into evidence:

A charcoal felt hat that LaPold observed being worn by Juvera at the time the officer stopped the Chevrolet; dark glasses which Juvera was wearing at the time of observation in the market area and which were observed on the seat when the vehicle was

stopped; a black cap which was found under a pillow between the two defendants; black gloves which were found on the seat; white gloves which also were found on the seat [R. T. 33]. A five-shot revolver .38 also was found on the front seat between the two defendants [R. T. 61].

Raymond Dole, Special Investigator for the Alcohol Tax Division of the Treasury Department, examined the shotgun on December 7, 1965, and upon measuring the barrel, found the barrel to be approximately thirteen and one-quarter inches in length [R. T. 63]. The overall measurement of the weapons was approximately twenty-one and one-quarter inches [R. T. 64].

Dole described the weapon as a shotgun which had the handle as well as the barrel cut off [R. T. 64]. Dole had in the past examined several hundred shotguns [R. T. 68].

Government's exhibit number 11, which was a certified copy of a record of the United States Treasury Department, was admitted into evidence. The record stated that no "evidence had been found to show that any person has registered the possession . . ." of the shotgun in question in the instant case and further, " . . . that neither Benito Martinez Juvera or Patrick Ramirez Cedillo, or anyone else, acquired said firearms by transfer" [R. T. 71].

VI

ARGUMENT

A. SECTION 5851 OF TITLE 26 OF THE UNITED STATES CODE, MAKING IT UNLAWFUL TO POSSESS A FIREARM WHICH HAS NOT BEEN REGISTERED AS REQUIRED BY SECTION 5841 OF TITLE 26 OF THE UNITED STATES CODE, IS CONSTITUTIONAL AND NOT VIOLATIVE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

This section (5851), has been held constitutional at least ten times:

Frye v. United States, 315 F. 2d 491 (9th Cir. 1963), cert. denied 375 U. S. 849, 84 S. Ct. 104, 11 L. Ed. 2d 76;

Starks v. United States, 316 F. 2d 45 (9th Cir. 1963);

Castellano v. United States, 350 F. 2d 852 (10th Cir. 1965), cert. denied 383 U. S. 949, 86 S. Ct. 1207, 16 L. Ed. 2d 211;

Taylor v. United States, 333 F. 2d 721 (10th Cir. 1964);

Sipes v. United States, 321 F. 2d 174 (8th Cir. 1963), cert. denied 375 U. S. 913, 84 S. Ct. 208, 11 L. Ed. 2d 150;

Capooth v. United States, 238 F. Supp. 583 (S. D. Tex. 1965);

Hazelwood v. United States, 208 F. Supp. 622 (N.D. Calif. 1962);

United States v. Forgett, 349 F.2d 601 (6th Cir. 1965), cert. denied 383 U.S. 426, 86 S. Ct. 929, 15 L.Ed.2d 845;

Mares v. United States, 319 F.2d 71 (10th Cir. 1963);

Haynes v. United States, 372 F.2d 651 (5th Cir. 1967).

In the most recent case, Haynes v. United States, supra, it was held "that statute rendering it unlawful for any person to receive or possess any firearms . . . which has not been registered as required by another statute is not unconstitutional even though [the] registration statute has been held unconstitutional, and conviction of unlawful possession of unregistered firearm does not violate [the] constitutional privilege against self-incrimination."

Two recent Ninth Circuit cases, Starks v. United States, supra, and Frye v. United States, supra, both held Section 5851 constitutional since this section concerns the possession of a firearm which no one has registered and not the failure of appellant to register. The statute which required the possessor to register a firearm was held unconstitutional in Russel v. United States, 306 F.2d 402 (9th Cir. 1962), but in the instant case the statute involved deals merely with possession by the appellant of an unregistered firearm and not the appellant's failure to register.

Another case since the Russel case, which found Section 5851 constitutional, is the case of Sipes v. United States, 321 F.2d 174

(8th Cir. 1963), where again the point was made that Section 5851 required only possession by the defendant of an unregistered fire-arm and not the appellant's failure to register same.

B. STATEMENTS MADE BY THE PROSECUTING ATTORNEY TO THE JURY IN HIS CLOSING ARGUMENT DID NOT AMOUNT TO PREJUDICIAL MISCONDUCT WHICH WOULD JUSTIFY A REVERSAL.

Arguments of counsel must be confined to the issues of the case, the applicable law, pertinent evidence, and such legitimate inferences as may properly be drawn therefrom. "When confined to the evidence or reasonable inferences, the arguments of counsel are not to be too narrowly limited." Wakaksan v. United States, 367 F. 2d 639, 646 (8th Cir. 1966).

Counsel is allowed in summation to the jury to present such legitimate inferences as could be drawn from the pertinent evidence adduced in the case. Further, such argument is not to be too narrowly limited. Wagner v. Pennsylvania Railroad Company, 28 F. 2d 392 (3rd Cir. 1960). The extent of a summation by counsel is left to the discretion of the trial judge, Wagner v. Pennsylvania Railroad Co., supra, at 396.

Defendant Cedillo cited three cases which he relies upon in his assertion of prejudicial error regarding the prosecuting attorney's closing argument:

Kemper v. United States, 151 F. 2d 680 (8th Cir. 1945);

Kraft v. United States, 238 F. 2d 794 (8th Cir. 1956);

Hargeth v. United States, 183 F. 2d 859 (5th Cir. 1950).

Those cases are easily distinguished from the instant case since in each of those cases the asserted prejudice was in the admission into evidence of other crimes. In the instant case the statements asserted as prejudicial were not admitted into evidence; on the contrary, the asserted prejudice was in the prosecuting attorney's closing argument which is not evidence at all and is not to be considered by the jury in their decision. The jury was so instructed [R. T. 144].

Reference is also made to the argument in Section D. hereinafter. The prosecuting attorney's argument was properly drawing an inference that because of the fact of an illegal enterprise, the appellants had the intent to possess the firearm without registering it.

C. THE SHOTGUN, GOVERNMENT'S EXHIBIT NO. 1, ADMITTED INTO EVIDENCE WAS NOT THE PRODUCT OF AN ILLEGAL SEARCH AND SEIZURE.

In a very recent Fifth Circuit case, Nunez v. United States, 370 F. 2d 538 (5th Cir. 1967), where the facts were almost identical with those in the instant case, the court admitted the shotgun into

evidence and held it was not obtained incident to an illegal search and seizure. In Nunez v. United States, supra, appellants, one Hendley and one Schwander, were riding in an automobile when two police detectives observed the automobile being driven recklessly. The officers pursued the vehicle and after it had been stopped, approached the automobile and found appellant lying on the front seat. The appellant was ordered out of the car. The officers then observed a sawed-off shotgun partially beneath the front seat. A search of the appellant disclosed shotgun shells of the same gauge as the weapon. It was held that the search was incident to a lawful arrest (traffic arrest). It was held that there was ample evidence to support the conclusion that the shotgun was clearly visible to the officers without a detailed search of the automobile.

D. THE COURT PROPERLY ADMITTED INTO EVIDENCE THE AUTOMATIC PISTOL, THE CHARCOAL FELT HAT, THE BLACK CAP, THE STOCKING MASK, THE SUNGLASSES, THE BLACK GLOVES, THE WHITE GLOVES AND THE REVOLVER. THESE OBJECTS WERE RELEVANT AND NOT PREJUDICIAL.

An honest and accurate statement of articles found on the premises at the time of the arrest was necessary to present a true word picture of the scene as observed by the persons present. Some courts have admitted evidence as to other articles found at the time of the search as constituting part of the res gestae.

United States v. Volkell, 251 F. 2d 333 (2nd Cir. 1958).

Further, the court in Volkell quoted from United States v. Penn., 115 F. 2d 672 (7th Cir. 1940), wherein it was said, "It was clearly proper to permit the police officer to name all of the articles which were found in the closet for the purpose of disclosing fully the circumstances surrounding the discovery of the gun."

"The facts with respect to the other articles found in the automobile were so interwoven with the facts respecting the firearm as to constitute part of the res gestae. Furthermore, this evidence tended to show that the persons using the garage were engaged in unlawful enterprises and were likely to have acquired the firearm unlawfully and to have failed to register the same." Crapo v. United States, 100 F. 2d 996 (10th Cir. 1939).

In the case of United States v. Gulley, 374 F. 2d 55, at page 58 (6th Cir. 1967), it was stated, " . . . it may be argued that the entire contents of the two sacks thrown out of the automobile were part of the res gestae and their admission was therefore proper because the facts with respect to the evidence sought to be stricken were so interwoven with the facts respecting the admissible narcotics as to be inseparable. Therefore, there was no error in the admission into evidence of the above described objects which were part of the res gestae and also were so interwoven with the facts respecting the admissible shotgun as to be inseparable."

E. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT CEDILLO HAD EITHER ACTUAL OR CONSTRUCTIVE, JOINT OR SINGLE POSSESSION OF THE SHOTGUN.

Possession means dominion and control. Possession can be constructive and does not have to be exclusive. Possession also can be joint. Arellanes v. United States, 302 F. 2d 603 (9th Cir. 1962).

Mere presence or proximity or association with another who is in actual or constructive possession is not sufficient to constitute dominion and control. Arellanes v. United States, supra; Brothers v. United States, 328 F. 2d 151 (9th Cir. 1964); Cipres v. United States, 343 F. 2d 95 (9th Cir. 1965). While presence or proximity or association alone is not sufficient to establish possession, in the instant case there is a great deal more than mere presence. The mask on Cedillo's forehead which later was found in the automobile, the suspicious activity in front of the market, the vehicle proceeding on the wrong side of the street, physical possession of a revolver, etc., take Cedillo out of the realm of mere presence. Therefore, the testimony regarding Cecillo's activities and movements prior to his arrest as well as the objects of the search of the automobile afforded an adequate basis for the jury's determination that the shotgun was in Cedillo's possession, i. e., . . . subject to his dominion and control. Cipres v. United States, supra.

Evidence is admissible against all defendants upon proof that they were engaged in a common enterprise. United States v.

Cohen, 124 F.2d 164 (2nd Cir. 1941), cert. denied 315 U.S. 811.

It appears obvious that the defendants were engaged in a common enterprise.

Evidence of this is the objects which were obtained in the search of the automobile plus the observations of the defendants as testified to by Officer LaPold.

In Johnson v. United States, 270 F.2d 721, at page 724 (9th Cir. 1959), the court quoted Form 55 -- Suggested Forms for Use in Criminal Cases, 20 F.R.D., 231-278:

> "A person who, although not in actual possession, knowingly has the power, at a given time to exercise dominion or control over a thing is then in constructive possession of it."

Two people therefore can have constructive possession over the same object.

In the instant case where the shotgun was under the front seat on the driver's side of the vehicle, either the driver Juvera or Cedillo had the power and could have, at any given time, exercised dominion and control over the shotgun. Therefore, Cedillo did in fact have constructive possession of the shotgun.

F. THE GOVERNMENT PROVED BEYOND A REASONABLE DOUBT THAT THE SHOTGUN IN QUESTION WAS NOT REGISTERED UNDER THE NATIONAL FIREARMS ACT.

Government's Exhibit number eleven was admitted into evidence and it stated:

> "This is to certify that I, Thomas H. Kuhn, Mail and Fire Supervisor, Administrative Section, Alcohol and Tobacco Division of the Internal Revenue Service, Washington, D.C., have custody and control of the National Firearms Registration and Transfer Record containing the registration of firearms as required under the National Firearms Act filed in the national office of the Internal Revenue Service, Washington, D.C. I further certify that after diligent search of said record no evidence has been found to show that any person has registered the possession of a Stevens single-barrel shotgun, model 107B, Stevens, 20-guage barrel, length 13-1/4 inches, J. Stevens Arms Company, Chicopee Falls, Mass., without a serial number, and that neither Benito Martinez Juvera or Patrick Ramirez Cedillo or anyone else acquired said firearm by transfer."
> [R. T. 71].

Title 26 of the Code of Federal Regulations, Section 179.120 provides in part:

> "Every person in the United States possessing a firearm (a) not registered to him . . . must execute an application for the registration of such firearm on Form 1 (Firearms), in duplicate, with the Director, Alcohol and Tobacco Tax Division, Internal Revenue Service, Washington 25, D.C., ..."

The statute dictates that the registration of a firearm be in Washington, D. C., with the Director, Alcohol and Tobacco Tax Division of the Internal Revenue Service. Government's exhibit eleven clearly states that there has not been registration of the firearm as is required by statute. The statute makes no reference at all to an individual's residence. Residence has no bearing on the registration. Registration must be in Washington, D. C. In the instant case the firearm was not registered and therefore, Section 5851 of Title 26 of the United States Code was violated.

G. IT IS NOT NECESSARY FOR THE GOVERNMENT TO PROVE THAT THE FIREARM IN QUESTION HAD A SMOOTH BORE.

The words "smooth bore" are taken from the definition of a shotgun in Title 26, Section 5848, of United States Code. However, it is not necessary in the instant case for the Government to prove

each element of this definition since there has been ample expert testimony that the firearm in question was in fact a shotgun.

Officer LaPold testified that the firearm he observed under the front seat in the Chevrolet was a shotgun. Officer Taylor testified that he observed LaPold remove a shotgun from the automobile.

Special Investigator Dole testified that he examined the weapon and that it is a shotgun. Dole testified further that the barrel of the shotgun measured thirteen and one-quarter inches and that the overall length of the shotgun measured twenty-one and one-quarter inches. Dole described the weapon in question as "a shotgun which has had the handle cut off and the barrel cut off". As a special investigator Dole has examined several thousand weapons. Dole also testified that the shotgun was manufactured by the Stevens Arms Company and that in his career he has examined several hundred Stevens shotguns. Therefore, it is apparent that the weapon in question was in fact a shotgun within the meaning of Title 26, Section 5851.

H. THE CHARGE IN THE INDICTMENT WAS NOT BROADENED AFTER TRIAL COMMENCED AND THERE WAS NO VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT OF DUE PROCESS WHEN THE CLERK IN IMPANELING THE JURY ANNOUNCED THAT THE INDICTMENT CHARGED A CRIME UNDER SECTION 5841, WHEN THE CRIME IN THE INDICTMENT WAS SECTION 5851.

Rule 52 of the Federal Rules of Criminal Procedure states, "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

In the opening statement by the prosecuting attorney Section 5851 was recited as being the charge in the indictment. All references during the course of the proceedings were to Section 5851. Further, the Judge in his instructions to the jury read the indictment which stated the section involved was 5851.

I. A PARTY CANNOT ASSIGN AS ERROR A PORTION OF THE COURT'S INSTRUCTIONS WHERE NO OBJECTION WAS MADE PRIOR TO THE JURY RETIRING TO CONSIDER ITS VERDICT.

Rule 30 of the Federal Rules of Criminal Procedure states in pertinent part: " . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection . . . ."

There is nothing in the transcript that indicates any

objection was made by appellant Cedillo regarding instructions which were prejudicial to him. Therefore, pursuant to Rule 30, Cedillo cannot cite as error a prejudicial instruction.

J. APPELLANT CEDILLO DOES NOT HAVE STANDING TO PROSECUTE AN APPEAL OF HIS CONVICTION.

Appellant Cedillo was sentenced and judgment against him entered on April 1, 1966. He did not file a notice of appeal until April 20, 1966. Therefore, his notice of appeal was not timely filed, and he thereby lacks standing to prosecute an appeal of his conviction.

Rule 37(a)(2), Federal Rules of Criminal Procedure.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of conviction of appellants Juvera and Cedillo should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

JAMES E. SHEKOYAN,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ James E. Shekoyan
JAMES E. SHEKOYAN

No. 21,138

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARMAND F. ROBERGE,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION

OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

MITCHELL ROGOVIN,
Assistant Attorney General.

LEE A. JACKSON,
GILBERT E. ANDREWS,
ROBERT H. SOLOMON,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

INDEX

Page

CITATIONS

Cases:

Statutes:

Internal Revenue Code of 1954:

Miscellaneous:

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21,138

ARMAND F. ROBERGE,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION

OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The Tax Court's memorandum findings of fact and opinion (I-R. 198-206) are not officially reported.

JURISDICTION

This petition for review (I-R. 225-230) involves federal income taxes for the taxable year 1961. On January 17, 1963, the Commissioner of Internal Revenue mailed to the taxpayer a notice of a deficiency, asserting deficiencies in taxes for the years 1960 and 1961 in the

aggregate amount of $1,569.20 (I-R. 5-9).[1/] Within ninety days thereafter, on April 15, 1963, the taxpayer filed a petition with the Tax Court for a redetermination of those deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. (I-R. 1-15.) The decision of the Tax Court was entered March 9, 1966. (I-R. 224.) The case is brought to this Court by a petition for review filed June 2, 1966 (I-R. 225-230), within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTION PRESENTED

Was the Tax Court correct in holding that the gain realized by taxpayer on the sale of his property at 455 North 35th Street, Seattle, Washington, which he held for rental and investment purposes, is to be recognized as a long-term capital gain?

STATUTES INVOLVED

The pertinent portions of the statutes involved are set out in the Appendix, infra.

STATEMENT

Armand F. Roberge, the taxpayer, resided at Cle Elum, Fall City, and 12508 Eighth Place, Everett, Washington, during the year in question, 1961. Taxpayer purchased part of the land at 12508 Eighth Place in 1957 and the remainder of it in 1961. He lived in a partially completed building on that land during 1961. (I-R. 199, 201; II-R. 18; Ex. 10, I-R. 81; Pet. Br. 6.)

1/ The Commissioner conceded at trial that there is no deficiency in tax for 1960. (I-R. 198-199.)

Prior to 1961, taxpayer owned two pieces of property which he held for rental and investment purposes, one of these properties was located at 2120 East 54th Street, Seattle, Washington. It was acquired on March 3, 1955, and sold in 1961. Since the taxpayer did not recover his adjusted cost basis in 1961, the parties agree that no capital gain was realized in that year on that sale. The other rental and investment property was located at 455 North 35th Street, Seattle, Washington. Taxpayer acquired it on April 4, 1957, for a purchase price of $4,250. During the years 1947 through 1959 taxpayer made additions and improvements to this property in the total amount of $14,196.47. In 1961 taxpayer sold this property for $12,000 in cash to the Seattle Disposal Company, a private corporation (I-R. 200-201; Stip. par 19, I-R. 51.) Taxpayer used the cash to purchase land at 12508 Eighth Place and in construction of a residence thereon.

The Commissioner determined that taxpayer realized a long-term capital gain in the amount of $1,678 on the sale of the property at 455 North 35th Street, computed by considering the original cost, cost of improvements and additions, depreciation allowed and allowable, and the sale price, all of which were stipulated. (I-R. 201-202.) 2/

In the Tax Court, the taxpayer argued that he realized no gain on the sale of the property at 455 North 35th Street, and, in the

2/ Taxpayer's basis was reduced to $10,322 by taking into account depreciation which was claimed and allowed on the basis of a 15 year useful life of the property.

alternative, that such gain was not recognizable for tax purposes under Sections 1031, 1033, and 1034 of the Internal Revenue Code of 1954. The Tax Court rejected his contentions, holding that taxpayer "has submitted no probative evidence and has directed our attention to no authorities in support of his position." (I-R. 202.)

SUMMARY OF ARGUMENT

Taxpayer sold property held for rental and investment purposes and used the proceeds to purchase property which he used as his residence and hoped later to rent. The gain on that sale is recognized unless taxpayer can show that the transaction comes within one of the nonrecognition provisions of the Internal Revenue Code of 1954. He urges that the transaction comes within Section 1031, 1033 and/or 1034.

Section 1031 provides for nonrecognition of gain from the exchange of income-producing property for property of a like kind. That section has no application to a sale for cash (as in the instant case) since a sale does not qualify as an exchange. This is clear from the decided cases and the legislative history of Section 1031. It also does not apply since like-kind property was not acquired.

Section 1033 provides for nonrecognition of gain from an involuntary conversion. Such involuntary conversion may occur through destruction, theft, seizure, or condemnation or requisition or the threat thereof. The property in question concededly was not destroyed, stolen or seized. Taxpayer admitted in his testimony that the property in question was voluntarily sold and not condemned,

requisitioned or under threat of such proceedings. Therefore Section 1033 has no application to the instant case.

Section 1034 provides for nonrecognition on the gain realized from the sale of one's principal residence under certain conditions. The statute clearly does not apply to the instant case where taxpayer sold property which the facts of record show was not his principal residence. Further, taxpayer's attempt to combine Sections 1031 and 1034 is totally unjustified and contrary to the clearly expressed intent of Congress.

Accordingly, the taxpayer cannot show that the nonrecognition sections of the Internal Revenue Code apply to the transaction here in question. The Tax Court was, therefore, correct in holding that the taxpayer's realized gain is recognized.

ARGUMENT

THE TAX COURT CORRECTLY HELD THAT THE GAIN REALIZED BY TAXPAYER ON THE SALE OF HIS PROPERTY AT 455 NORTH 35th STREET, SEATTLE, WASHINGTON, WHICH HE HELD FOR RENTAL AND INVESTMENT PURPOSES IS TO BE RECOGNIZED AS A LONG-TERM CAPITAL GAIN

A. Introduction

In 1961 taxpayer sold certain property (land and a building thereon at 455 North 35th Street in Seattle) which he held for investment and rental purposes, for $12,000 in cash. (I-R. 200.) With part of the cash received on that sale, he purchased in a separate transaction in that same year, another piece of land (located

at 12508 Eighth Place, Everett, Washington) and began construction thereon of a house to be used as his personal residence and for rental purposes. (I-R. 201, 203.) The house at 12508 Eighth Place had not been completed at the time of trial, nor had any portion of it been rented although taxpayer has resided there since 1961. (I-R. 201, 204; II-R. 18; Ex. 10, I-R. 81.) This appeal presents the question of whether the gain realized on the sale of the property at 455 North 35th Street is to be recognized for tax purposes. 3/

A gain realized from the sale or exchange of property is recognized and results in taxable gain unless the taxpayer can show that one of the nonrecognition provisions of Subtitle A of the Internal Revenue Code of 1954 governs such sale or exchange. Internal Revenue Code of 1954, Section 1002, Appendix, infra. Taxpayer argues that this transaction is governed by Sections 1031, 1033 and/or 1034 of the 1954 Code Appendix, infra. None of these provisions apply to the sale in question, however, the gain realized on that

3/ In the Tax Court, taxpayer argued that he realized no gain on the sale in question. (I-R. 202.) On appeal, he has apparently dropped this contention and argues only that the gain, although realized, is not recognized. (Br. 9-10.) The amount of gain which taxpayer realized is the excess of the amount received over the adjusted basis of the property sold. Internal Revenue Code of 1954, Section 1001(a), Appendix, infra. Taxpayer stipulated the amount he received on the sale as well as all elements necessary to determine his basis. The Tax Court's decision was based on these stipulated facts, which showed that taxpayer had realized a gain on the sale in question. (I-R. 202.)

sale results in taxable income to taxpayer, as found by the Tax Court.

B. Congress has limited the application of Section 1031(a) to exchanges of like-kind property; that section does not apply where property is sold and the proceeds are invested in dissimilar property

Under Section 1031(a) of the 1954 Code, no gain or loss is recognized if property held for productive use or investment is exchanged for property of a like kind (except to the extent of "boot" received in addition to the like-kind property under Section 1031(b)). If, on the other hand, property held for productive use or investment is sold, the gain or loss realized on the sale is recognized. Section 1002 of the 1954 Code. 4/ The distinction between a sale and exchange is crucial to the disposition of this case. No "exchange" as contemplated by Section 1031 occurred here when the taxpayer sold his property at 455 North 35th Street to the Seattle Disposal Company and thereafter invested the proceeds in other property. Those transactions did not amount to an exchange since "'Exchange' is a word of precise import, meaning the

4/ The reason for this difference in treatment is that, in an exchange, while taxpayer has realized gain or loss in a constitutional sense, his money is still tied up in a continuing investment and he has not realized gain in a practical and economic sense. In a sale, on the other hand, taxpayer has "cashed in" on his gain or closed out his losing venture, and gain or loss is realized in both the constitutional and the practical and economic sense. Portland Oil Co. v. Commissioner, 109 F. 2d 479 (C. A. 1st), certiorari denied, 310 U. S. 650.

giving of one thing for another, requiring the transfer to be in kind, and excluding transactions into which money enters either as the consideration or as a basis of measure." Trenton Cotton Oil Co. v. Commissioner, 147 F. 2d 33, 36 (C. A. 6th); see Bloomington Coca-Cola B. Co. v. Commissioner, 189 F. 2d 14, 16 (C. A. 7th); Cowden v. Commissioner, decided October 21, 1965 (P-H Memo T. C., par. 65,278), affirmed per curiam, 365 F. 2d 832 (C. A. 1st), petition for writ of certiorari pending (1966 Term, No. 872).

Both Section 1031(a) and its legislative history place an important qualification on the rule of nonrecognition contained therein. While the legislative mandate is to postpone recognition of gain or loss when the essential features of the investment remain the same, Section 1031(a) extends that rule only to true exchanges of like property. A sale, even though followed by an immediate reinvestment in similar property, does not fall under that statutory umbrella. Coastal Terminals, Inc. v. United States, 320 F. 2d 333, 337 (C. A. 4th); Trenton Cotton Oil Co. v. Commissioner, supra, p. 36; Bloomington Coca-Cola B. Co. v. Commissioner, supra, p. 16; Rogers v. Commissioner, 44 T.C. 126, pending on appeal (C. A. 9th, No. 20,621); Detroit Egg Biscuit & Specialty Co. v. Commissioner, 9 B.T.A. 1365. That a sale of property for cash and a subsequent investment of the proceeds in other property is not an exchange within the meaning of Section 1031 is clear from the following colloquy in the House of

Representatives between one of the sponsors of the bill containing the original predecessor of Section 1031 (Section 203(b)(1) of the Revenue Act of 1924, c. 234, 43 Stat. 253) and another Representative (65 Cong. Record, Part 3, p. 2799):

> Mr. LaGuardia. Under this paragraph is it necessary to exchange the property? Suppose the property is sold and other property immediately acquired for the same business. Would that be a gain or loss, assuming there is a greater value in the property acquired?
>
> * * * *
>
> Mr. Green of Iowa. If the property is reduced to cash and there is a gain, of course it will be taxed.
>
> Mr. LaGuardia. Suppose that cash is immediately put back into the property, into the business?
>
> Mr. Green of Iowa. That would not make any difference.

Accordingly, it is clear from the decided cases and the legislative history that the transactions in the instant case do not qualify as an exchange and are, therefore, not governed by Section 1031. This result is within the intent of Congress in enacting Section 1031 since, when taxpayer sold the property at 455 North 35th Street, he received $12,000 in cash which he was free to use as he wished. He had realized a gain in every sense of the word and, therefore, that gain is recognizable for tax purposes. The fact that he chose to

invest the proceeds of the sale in different property does not change the essential nature of the previous sale.[5/]

C. Section 1033 does not apply to taxpayer's voluntary sale of his property to a private corporation

Section 1033(a) of 1954 Code provides that gain realized upon an involuntary conversion of property will not be recognized. An involuntary conversion is one occasioned by destruction, theft, seizure, or condemnation or requisition or the threat thereof. Taxpayer argues that the property in question was condemned.

In order to qualify for nonrecognition under the portion of Section 1033(a) relating to condemnation and requisition, taxpayer must show that a government--state, local or federal--instituted condemnation or requisition proceedings or threatened to do so. Hitke v. Commissioner, 296 F. 2d 639 (C. A. 7th). Such condemnation must be completely beyond the control of the taxpayer. Dear Publication & Radio, Inc. v. Commissioner, 274 F. 2d 656 (C. A. 3d). In the instant case taxpayer testified at trial that he was approached by a Mr. Meacham, of the Seattle Disposal Company, who offered him $12,000 for the property in question, which he accepted. (II-R. 25.) He conceded that the Seattle Disposal Company was a private corporation engaged in the business of garbage collection

5/ Section 1031(a) is not applicable also because the property sold was unlike the property later acquired. The Tax Court did not reach that question, however, because of the absence of the requisite exchange. (I-R. 204.)

which had no connection with the government other than its possession of a contract with the City of Seattle for collection of garbage. (II-R. 40.) Taxpayer testified as follows (II-R. 40):

> Q. Did the state, federal or any municipal government condemn or requisition your property? Did they [Seattle Disposal Company] get any information from any of these governments that your property was to be condemned?
>
> A. No, it was just obvious.
>
> Q. Did you, in fact, receive any communication from any government, whether it be on the city, state or federal level, with respect to condemnation of this property at 455 North Thirty-fifth Street?
>
> A. No.

Since, by taxpayer's own admission, there was no requisition, condemnation, or threat thereof, Section 1033 has no application to gain realized on the sale in question.

D. Section 1034(a), providing for non-recognition of gain realized from the sale of a residence under certain conditions, does not apply to the sale of rental and investment property

Section 1034(a) of the 1954 Code provides that where a taxpayer sells his principal residence and, within a period beginning one year before the date of sale and ending one year after the date of sale, purchases a new residence, gain will be recognized only to the extent that the adjusted sales price of the old residence exceeds the cost of purchasing the new residence. As already stated, taxpayer in the instant case sold property which he held for rental and

investment purposes and invested the proceeds in a residence. Section 1034(a) on its face applies only to the sale of one's old residence and purchase of a new residence. The statute clearly does not apply to the instant case.

In the Tax Court, taxpayer argued that he sold two pieces of property as a "package", 455 North 35th Street, the rental and investment property, and 2120 East 54th Street, the residential property, and that the property purchased was held for rental and investment as well as residential purposes. (I-R. 203.) The record in this case, however, fails to disclose any link between the two transactions. Taxpayer claimed that Section 1031 (relating to exchanges of income-producing and investment property) and Section 1034 (relating to sale of a residence) could be combined to avoid any recognition of gain on these transactions. The Tax Court rejected this argument, as follows (I-R. 205-206):

> We find no justification for petitioner's [taxpayer's] apparent attempt to combine the use of sections 1031 and 1034 to obtain nonrecognition of his gain on the sale of the property at 455 North 35th Street, Seattle, Wash. Each of those sections was enacted to provide relief in the specific circumstances covered therein and there is no authority for combining two separate transactions to gain partial nonrecognition of gain under one section and nonrecognition of the remaining gain under the other section.

It is not clear whether on this appeal taxpayer renews the contention made in the Tax Court. He now urgues that 455 North

35th Street was his principal place of residence when it was sold in 1961 and that Section 1034(a) applies for that reason. (Br. 9, 14.) Before trial, however, he stipulated that the property at 455 North 35th Street was held for rental and investment purposes and that during 1960 and 1961 he lived at places other than that address. (Stip. pars. 1, 5, 19, I-R. 47, 48, 51.) Since taxpayer introduced no evidence in this connection other than the stipulation, the Tax Court correctly held (I-R. 205): "It is clear that petitioner [taxpayer] was not using the property at 455 North 35th Street, Seattle, Wash., as his residence at the time of the sale * * *."

In any event, it is clear that both of taxpayer's contentions are incorrect. His "package" theory is unsupported by any cases or legislative history and is contrary to the clearly expressed intent of Congress to grant specific relief in specific situations. Further, the transaction in which the property at 2120 East 54th was sold is not before the Court since no gain was recognized on that sale. Taxpayer's argument that the sale of 455 North 35th Street was the sale of his residence is factually incorrect and is inconsistent with his argument below that his residence was 2120 54th Street.

Finally taxpayer argues that the District Court case of Sayre v. United States, 163 F. Supp. 495 (S.D. W. Va.), is controlling here. In that case, the taxpayer exchanged a farm, on which was located their residence, for another farm and in addition received cash boot.

They then invested part of the cash boot in a new residence. The sole issue presented to the court was the allocation of the cash received as between the residence and the farm since only the former portion would not be recognized when it was used to purchase a new residence. There was no question as to whether the transaction qualified for nonrecognition, since, except for the boot, taxpayers were in the same position before the sale as after it. As the court stated (pp. 497-498)--

> In the instant case, after the exchange of farms and residences, taxpayers owned geographically different property from that held previously, but they still owned substantially the same things as before. At the beginning of 1951 these plaintiffs owned a farm and a $9,000 residence. At the conclusion of the transactions described above, they still owned a farm, and a residence * * *.

That case is thus clearly distinguishable from the instant case, where before the sale in question taxpayer owned rental and investment property and after the sale he owned residential property. Further, in the Sayre case the income-producing property was disposed of in an exchange which qualified under Section 1031, (income producing property for income producing property) whereas in the instant case such an exchange was absent.

CONCLUSION

None of the nonrecognition sections of the 1954 Code apply to the instant case. The decision of the Tax Court holding that

taxpayer's gain on the sale in question is recognizable is correct and should be affirmed. [6]

Respectfully submitted,

MITCHELL ROGOVIN,
Assistant Attorney General.

LEE A. JACKSON,
GILBERT E. ANDREWS,
ROBERT H. SOLOMON,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

MARCH, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1967.

_____
ROBERT H. SOLOMON
Attorney

6/ Taxpayer requests this Court to remand this case to the Small Tax Division of the Tax Court if it is reversed. (Br. 16.) S. 18, 90th Cong., 1st Sess., a bill to establish such a division, is now pending in the Senate and has not been enacted into law. There is, therefore, no authority for the remand which taxpayer requests.

APPENDIX

Internal Revenue Code of 1954:

SEC. 1001. DETERMINATION OF AMOUNT OF AND RECOGNITION OF GAIN OR LOSS.

(a) Computation of Gain or Loss.--The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

* * *

(c) Recognition of Gain or Loss.--In the case of a sale or exchange of property, the extent to which the gain or loss determined under this section shall be recognized for purposes of this subtitle shall be determined under section 1002.

* * *

(26 U.S.C. 1964 ed., Sec. 1001.)

SEC. 1002. RECOGNITION OF GAIN OR LOSS.

Except as otherwise provided in this subtitle, on the sale or exchange of property the entire amount of the gain or loss, determined under section 1001, shall be recognized.

(26 U.S.C. 1964 ed., Sec. 1002.)

SEC. 1031. EXCHANGE OF PROPERTY HELD FOR PRODUCTIVE USE OR INVESTMENT.

(a) Nonrecognition of Gain or Loss From Exchanges Solely in Kind.--No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other secruities or evidences of

indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment.

(b) [as amended by Sec. 201(c), Act of September 22, 1959, P. L. 86-346, 73 Stat. 621] Gain From Exchanges Not Solely in Kind.--If an exchange would be within the provisions of subsection (a), of section 1035(a), of section 1036(a), or of section 1037(a), if it were not for the fact that the property received in exchange consists not only of property permitted by such provision to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

* * *

(26 U.S.C. 1964 ed., Sec. 1031.)

SEC. 1033. INVOLUNTARY CONVERSIONS.

(a) General Rule.--If property (as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof) is compulsorily or involuntarily converted--

(1) Conversion into similar property.--Into property similar or related in service or use to the property so converted, no gain shall be recognized.

* * *

(3) Conversion into money where disposition occurred after 1950.--Into money or into property not similar or related in service or use to the converted property, and the disposition of the converted property (as defined in paragraph (2)) occurred after December 31, 1950, the gain (if any) shall be recognized except to the extent hereinafter provided in this paragraph:

(A) Nonrecognition of gain.--If the taxpayer during the period specified in subparagraph (b), for the purpose of replacing the property so converted, purchases other property similar or related in service or use to the property so converted, or purchases stock in the acquisition of control of a corporation

owning such other property, at the election of the taxpayer the gain shall be recognized only to the extent that the amount realized upon such conversion (regardless of whether such amount is received in one or more taxable years) exceeds the cost of such other property or such stock. Such election shall be made at such time and in such manner as the Secretary or his delegate may by regulations prescribe. * * *

* * *

(26 U.S.C. 1964 ed., Sec. 1033.)

SEC. 1034. SALE OR EXCHANGE OF RESIDENCE.

(a) Nonrecognition of Gain.--If property (in this section called "old residence") used by the taxpayer as his principal residence is sold by him after December 31, 1953, and, within a period beginning 1 year before the date of such sale and ending 1 year after such date, property (in this section called "new residence") is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer's adjusted sales price (as defined in subsection (b)) of the old residence exceeds the taxpayer's cost of purchasing the new residence.

* * *

(26 U.S.C. 1964 ed., Sec. 1034.)

NO. 21141

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DECEVIGNE KILPATRICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MANUEL L. REAL,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

NO. 21141

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DECEVIGNE KILPATRICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MANUEL L. REAL,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 21141

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DECEVIGNE KILPATRICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

The appellant, Decevigne Kilpatrick, was indicted on March 2, 1966, by the Federal Grand Jury for the Southern District of California, Central Division.[1/]

This Indictment, which consisted of one count, charged appellant with transporting a 1966 Chevrolet Station Wagon in interstate commerce from Seattle, Washington to Fresno County, California, knowing that this motor vehicle had been stolen, in violation of Section 2312, Title 18, of the United States Code [C. T. 2].

The appellant was arraigned and entered a plea of not guilty

1/ C. T. refers to Clerk's Transcript of Proceedings.

as charged in the Indictment, on April 11, 1966.

A waiver of jury was filed, and trial was had before the Honorable Myron D. Crocker, United States District Judge, on May 31, 1966. Appellant's motion for judgment of acquittal was denied and he was found guilty [C. T. 14].

On June 13, 1966, appellant was sentenced to imprisonment for a period of three years, by the Honorable Myron D. Crocker, who included in the sentence his recommendation that the appellant be placed in an institution where he could receive psychiatric treatment [C. T. 15].

A timely notice of appeal was filed by appellant on June 17, 1966 [C. T. 18], and on June 29, 1966, appellant filed his statement of the point on which he intended to rely on appeal, namely, "That the Court erred in applying the MacNaughton irresistible impulse test of criminal responsibility and failed to apply the 'substantial capacity' test of the Model Penal Code" [C. T. 19].

The District Court had jurisdiction of the cause under Title 18, United States Code, Sections 3231 and 3237.

This Court has jurisdiction under Sections 1291 and 1294, Title 28, of the United States Code.

STATEMENT OF FACTS

On February 10, 1966, appellant Decevigne Kilpatrick was apprehended by members of the California Highway Patrol near Kingsburg, California, after leading them on an extended chase. 2/

2/ R. T. 62-66; R. T. refers to Reporter's Stenographic Transcript.

Appellant admitted that he had stolen the 1966 Chevrolet Station Wagon, in which he was apprehended, from a new car dealer in Seattle, Washington, and transported it across several state lines [R. T. 74].

The business manager of Nelson Chevrolet in Seattle, Washington, testified that the 1966 Chevrolet Station Wagon had been stolen from his company in the early part of 1966 [R. T. 70].

Solely at issue in the trial was the defendant's mental competency, and two psychiatrists were appointed to assist the court in this regard. The reports of Jackson C. Dillon, M. D., and Ilse Vivien Colett, M. D., were received in evidence [R. T. 6-7, 41], and are a part of the record on appeal [C. T. 3-13].

From the psychiatric testimony it developed that the appellant is an alert, well oriented, highly intelligent individual who communicates easily [R. T. 12]. His IQ is somewhere in the upper 15% of the American population [R. T. 16-17], and he was considered coherent, relevant, well-spoken and to have displayed no deficiency in memory for recent and past events [R. T. 34].

Both psychiatrists mentioned that while in prison, appellant had served as a psychiatric technician and had been assigned to deal with suicidal prisoners [R. T. 16, 30-31].

It was the opinion of Dr. Dillon that the appellant was "not suffering from any psychiatric illness; that is, a mental illness or nervous illness of any consequence or importance" [R. T. 12].

And the appellant "had been of sound mind in the past, too" [R. T. 12-13]. Furthermore, the appellant did not demonstrate any neurotic or psychoneurotic symptoms [R. T. 17].

Regarding the question of whether the appellant was suffering from a mental disease or defect, the following testimony was elicited from Dr. Dillon on cross-examination:

> "Q. Now, you testified on direct examination, Doctor, that the defendant does not suffer from a mental disease; is that correct?
>
> "A. Yes.
>
> "Q. Would you say that he had a mental defect?
>
> "A. Well, not a mental defect. The kind of defect I feel he has is in his personality." (R. T. 24].

Dr. Colett's opinion differed from Dr. Dillon's in that she felt appellant's illness <u>was</u> a mental defect [R. T. 43-44]. However, Dr. Colett further stated that in her interpretation <u>most</u> sociopaths have a mental defect [R. T. 49].

Dr. Colett gave her diagnosis in the following manner:

> "A. I felt that Mr. Kilpatrick had a sociopathic personality disturbance. He shows an antisocial reaction with severe neurotic compulsive tendencies.
>
> "Q. Can this man therefore be considered insane in the true concept of mental illness?
>
> "A. In the true concept of mental illness,

no." [R. T. 38].

Dr. Dillon testified as to his diagnosis:

"A. Well, my diagnosis was that of a personality disorder, sociopathic type. By that I mean that he has a personality difficulty which would lead to abnormal or antisocial behavior.

"Q. Would such diagnosis militate against his criminal responsibilities?

"A. No, I think most criminals would fall in this category.

"Q. Is it your opinion that the defendant has a compulsion to steal cars, Doctor?

"A. Well, he is certainly a recidivist. He has stolen cars anytime the opportunity arose, certainly, when he is released from custody. I'm not so sure that he has a compulsion to steal them in the sense of a psychoneurotic compulsion. I think that this is a recidivist behavior pattern.

"Q. Is it your testimony that this is or is not the product of an organic brain disfunction?

"A. I don't believe its the result of organic brain disfunction; no.

"Q. Is it the result of any recognized mental illness?

"A. No, I don't think so." [R. T. 18].

Both psychiatrists testified that the appellant is not able to tolerate release from incarceration, and that if he is released again without psychiatric intervention he will likely commit further crimes in an effort to return to the prison environment [R. T. 20-22, 38-40]. The anxiety which appellant experiences upon his release is not a neurotic anxiety, but rather a nervousness commensurate to all the circumstances of his situation [R. T. 28].

It was Dr. Dillon's opinion that appellant is "a typical example of a recidivist sympton, who, as soon as he is released from prison, would promptly carry out that same type or almost exactly the same pattern of activity that he previously demonstrated" [R. T. 22].

ARGUMENT

I

THIS CASE PRESENTS NO REASON TO CHANGE THE TRADITIONAL TEST OF INSANITY IN THE NINTH CIRCUIT.

The M'Naghten - "irresistible impulse" test is the firm-standing test of criminal insanity in this jurisdiction, despite attempts on the part of some litigants to replace it with the Durham rule or the American Law Institute's formula. Sauer v. United States, 241 F. 2d 640 (9 Cir.), cert. den. 354 U. S. 940, 77 S. Ct. 1405 (1957); Smith v. United States, 342 F. 2d 725 (9 Cir. 1965). M'Naghten - "irresistible impulse" is the measure which is employed in the majority of American jurisdictions. Anderson v.

United States, 237 F. 2d 118 (9 Cir. 1956). The Court, in Sauer, supra, stated that "it is not for this court to undertake a drastic revision in the concept of criminal responsibility, a task which would necessitate a searching analysis of philosophies, purposes and policies of the criminal law, and which might substitute freedom of insane persons for either confinement or commitment. If change there is to be, it must come from a higher judicial authority, or from the Congress."

Whether the court meant by that language that it considered itself unable to change the law or, rather, unwilling to change the law, the court was certainly indicating caution and restraint from acting in any situation where the alternative proposed and the urges of justice did not compel so drastic a revision of the law.

That the American Law Institute's test of insanity does not offer so compelling an alternative, especially in light of the existing lack of automatic commitment provisions in most federal courts, is reflected by the fact that the Ninth Circuit has recently considered and rejected this definition. Smith v. United States, 342 F. 2d 725 (9 Cir. 1965).

II

THERE IS NOTHING IN THE RECORD TO INDICATE THAT THE TRIER OF FACT DID NOT APPLY THE AMERICAN LAW INSTITUTE'S TEST OF INSANITY, AS WELL AS THE M'NAGHTEN - "IRRESISTIBLE IMPULSE" TEST.

In his closing statement before the trial court, defense counsel argued that the defendant was insane under the American Law Institute's definition of insanity, as well as under the traditional Ninth Circuit definition of insanity [R. T. 77-81].

In rendering his decision, Judge Crocker had the following discussion with counsel for the defense:

> "THE COURT: Yet, both (psychiatrist) claim that he is sane.
>
> "MR. JONES: In the McNaughton sense, you mean.

"THE COURT: In the McNaughton sense or any other sense." [R. T. 86].

From this discussion it would appear that the trier of fact, in reaching its opinion as to the sanity of appellant, found the defendant to be sane under the traditional M'Naghten - "irresistible impulse" test, and under the ALI Mental Disease-Defect-Substantial Capacity Test, especially since there is nothing in the record to indicate that the court did not apply the ALI test which counsel for the defendant, in his final argument, defined and requested [R. T. 77-81].

III

THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE FINDING THAT APPELLANT'S CONDUCT WAS NOT THE RESULT OF A MENTAL DISEASE OR DEFECT.

The Model Penal Code of the American Law Institute, Section 4.01(1), provides:

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." [emphasis added].

The application of this test seeks a "mental disease or defect". The testimony of the psychiatrists in the court below was in conflict as to whether appellant was suffering from a mental disease or defect.

Dr. Dillon stated, unequivocally, that appellant was not suffering from a mental disease or defect [R. T. 24].

Dr. Colett was of the opinion, however, that appellant's illness was a mental disease. Yet, Dr. Colett's diagnosis, like Dr. Dillon's, was that appellant had a sociopathic personality [R. T. 18, 38], and, as Dr. Dillon testified, most criminals fall within this diagnosis [R. T. 18]. Dr. Colett even went on to say that, in her opinion, most sociopaths have a mental defect [R. T. 49]. It is submitted, therefore, that what Dr. Colett meant by "mental defect" could not have been what the writers of the American Law Institute test meant by mental defect, otherwise almost every criminal before the courts would be classified insane.

The verdict of the trial judge as the sole trier of fact in this case must be sustained, since there is substantial evidence, taking the view most favorable to the Government, that appellant's failure to conform his conduct to the requirements of law was not the result of a mental disease or defect. Fraker v. United States, 294 F. 2d 859, 861 (9 Cir. 1961).

CONCLUSION

The position of the Government is that Judge Crocker did apply the ALI test, after defense counsel defined and argued for it. Judge Crocker, with the ALI test, and the traditional Ninth Circuit standard in mind, found that the evidence, in his opinion, did not support a finding of not guilty by reason of insanity "under any test". Since there is substantial basis in the evidence for Judge Crocker's decision, the judgment below should be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.

WILLIAM J. GARGARO, JR.
Assistant United States Attorney

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: CLAUDIA WALKER Appellant	)	NO. 21,147

APPELLANT'S OPENING BRIEF

(28 USC 1443)
(28 USC 1447(d)

CLAUDIA WALKER
P. O. Box 3189
San Francisco 19
California
392-0125

Appellant

INDEX

CITATIONS

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the U. S. Court of Appeals for the 9th Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

Dated: October 10, 1966.

CLAUDIA WALKER
Appellant

DECLARATION OF SERVICE

I have this date served personally or by mail a copy of this Appellant's Opening Brief on Judge Joseph Karesh, City Hall, San Francisco; District Attorney Ferdon, 850 Bryant Street, San Francisco; Clerk, District Court of Appeal, State Building, San Francisco; U. S. District Court, 450 Golden Gate Avenue, San Francisco.

Dated: October 10, 1966.

CLAUDIA WALKER
Appellant

> Art. 2. The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus and of the trial by jury, of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land and should the public exigencies make it necessary for the common preservation to take any person's property, or to take his particular services, full compensation shall be made for the same and in the just preservation of rights and property it is understood and declared that no law ought ever to be made or have force in the said territory, that shall in any manner whatever interfere with or affect private contracts or engaged bona fide and without fraud previously formed.

It is noteworthy that the specified rights are in perpetuity and have never been abrogated and therefore cannot be alienated by Congress, the Legislature, the President, the Governor, the Courts, or the Chief Justice or Federal or State Justices or Judges or public officials representative by appointment of special interests and minority groups including alien races and philosophies impelled with the idea of power-domination over ancestral Americans and the Constitution which protects their inalienable rights.

Senate Document 39, supra, presents at page 826 a discussion of Article VI, Clause 2, to-wit: the National Supremacy Clause.

Article VI, Clause 2

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

Appellant presents the following passages concerning the aforesaid discussion of the Supremacy Clause:

> This Constitution, laws and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. Their obligation "is imperative upon the state judges, in their official and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment which they were not to decide merely according to the laws or constitution of the state, but according to the laws and treaties of the United States in "the supreme law of the land" (21).
>
> (21) Martin v. Hunter's Lessee, 1 Wheat 304, 335 (1816)

It is noteworthy that neither the Congress nor the California State Legislature can enact laws, and that the President and the Governor and the Federal and State Courts cannot enforce laws which are in contravention of the United States Constitution, which is the supreme law of the land and, if such laws are so made and attempted to be so enforced, the same are void.

See 92 CJS at page 1024:

The distinction between a thing void and one

voidable has been stated by Lord Bacon and is that a thing is void which was done against law at the very time of doing it, and no person is bound by such act.

Senate Document 39, supra, presents at page 716 a discussion of Article III, Section 2, Clause 1.

Article III, Section 1, Clause 1

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish.

Article III, Section 2, Clause 1

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; ...

Article III, Section 2, Clause 2

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. ...

Senate Document 39, supra, presents at page 621 the following definition:

Cases arising under the Constitution are cases which require an interpretation of the Constitution for their correct decisions. They arise when a litigant claims an actual or threatened invasion of his constitutional rights by the enforcement of some act of public authority, usually an Act of Congress or of a state legislature, and asks for judicial relief.

Appellant presents the following passage concerning the aforesaid discussion of Article III, Section 2, Clause 1:

From Osborn v. U. S. Bank (22 US 737) to Ex parte Young (209 US 123), the Supreme Court established

firmly the rule that jurisdiction exists in the federal courts to restrain the enforcement of unconstitutional state statutes and to enjoin state officials charged with the duty of enforcing state laws from bringing criminal or civil proceedings to enforce an invalid statute.

It is stated in Ex parte Young, 209 US 123:

When the question of the validity of a state statute with reference to the federal constitution has been first raised in a federal court that court has the right to decide it to the exclusion of all other courts.

The attempt of a state officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the state in its sovereign or governmental capacity, and is an illegal act and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to its officer immunity from responsibility to the supreme authority of the United States.

Senate Document 39, supra, at page 1046, with regard to Amendment XI concerning "what constitutes state action" cites Osborn v. U. S. Bank, supra:

...a state official possesses no official capacity when acting illegally and hence can derive no protection from an unconstitutional statute.

It was held in Fenn v. Holme, Ho. (1859) 21 How. 484, 16 L Ed 198:

In every instance in which this court has expounded the phrases "proceedings at the common law" and "proceedings in equity", with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal; and the latter as meaning the administration with reference to equitable as

contradistinguished from legal rights, of the equity law as defined and influenced by the Court of Chancery in England.

It was held in Root v. Lake Shore etc. R. Co.

Ill. (1882) 105 US 206, 26 L Ed 975:

The distinction of jurisdiction between law and equity is constitutional to the extent to which the 7th amendment forbids any infringement of the right of trial by jury as fixed by the common law.

It was held in Goldman v. Postal Telegraph,

DC Del. (1943) 52 F Supp 763:

Where constitutional rights are involved, it is the duty of federal courts to secure their protection even though state courts may fail to do so in analogous situations.

A brief summary of the foregoing indicates

(1) That appellant, as a lawful lineal descendant of South Carolina citizens, who ratified the Constitution, has inalienable rights as set out in the Ordinance for the Government adopted 1787;

(2) That state courts and judges are required to comply with Article VI, Clause 2, to-wit: to conform decisions made under the authority of state constitutions and laws to the civil rights guaranties accorded to ancestral Americans in the Constitution;

(3) That cases arising under the Constitution and laws, made in pursuance thereof, shall be determined by the Supreme Court;

(4) That federal courts shall restrain the enforcement of unconstitutional state statutes and shall determine the validity of state statutes with reference to the Constitution when asked to do so;

(5) That the acts of state officers in attempting to enforce unconstitutional statutes, being unlawful, are void and represent personal acts of the officer rather than the acts of the state;

(6) That in federal courts matters shall be determined with specific reference to requirements

of the common law, and with specific reference to equity, as guaranteed on both counts by the Constitution;

(7) That where constitutional rights are involved it is the duty of federal courts to secure their protection even though state courts fail to do so.

As shown by Appellant's Opening Brief, DCA 1 Civil 23371, Argument I:

THE DECEMBER 20, 1939, INTERLOCUTORY JUDGMENT IS VOID, BECAUSE THE JUDGE WAS AN EMPLOYER-PARTY OF THE MEDICAL EXAMINERS, AS DISCOVERED ON APRIL 14, 1964.

Section 170 of the Code of Civil Procedure, State of California states:

No...Judge shall sit or act as such in any action or proceeding:
1. To which he is a party; ...
4. When in the action or proceeding, or in any previous action or proceeding involving any of the same issues, he has been attorney or counsel for any party ...
5. When it is made to appear probable that by reason of bias or prejudice of such justice or judge a fair and impartial trial cannot be had by him.

There is cited the case of United RE & Trust Co. v. Barnes (1911) 159 C 242:

When statutes expressly forbid persons performing judicial functions from acting where they are interested, such interest, if subsequently shown, renders the decision void.

As shown by Exhibit "I" of said brief, an impartial court is a fundament of "due process":

Competent tribunal required. "Due process" implies a tribunal both impartial and mentally competent to afford a hearing.
Inland Steel Co. v. Nat'l Labor Rel. Bd., CCA 7, 109 F 2d 9, 20

As shown by Exhibit "I" of said brief, the certification by two physicians is devoid of "due process" elements:

> The proceeding provided for by statute for the certification by two physicians as to insanity of a person is entirely devoid of the essential elements of "due process of law".
> In re Cornell, 18 A 2d 304, 306; 111 Vt. 525

The foregoing refers to the common law "due process of law" as required by Article VI, Clause 2, and guaranteed by Amendment V and by the "due process" provisions of Amendment XIV, Section 1.

> Amendment V
>
> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> Amendment XIV, Section 1
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

(Emphasis Amend. V and XIV added)

Also, there has been denial of equal protection of the law in this case, as required by Article VI, Clause 2, and guaranteed by Amendment VI and the equal protection of law provisions of Amendment XIV, Section 1.

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV, Section
quoted on previous page

It was held in U. S. v. Snow, 219 F Supp 417 (1963):

> Sixth Amendment insofar as it is applicable to states through 14th Amendment, refers only to criminal prosecutions.

It was held in Denton v. Conn., Ky (1964) 383 SW 2d 681:

> Bare accusation of insanity acts is not proper basis for classification and in a lunacy inquest manner of proceeding, rules of evidence and burden of proof should be the same as those in any criminal or quasi-criminal trial.
>
> It was reversible error to admit evidence of doctors by certificate or affidavit as to mental condition of defendant in lunacy inquest.

There is attached as Exhibit "A" and incorporated by reference a published document, entitled "The Continuance of the Deprivation of Civil Rights in the

Walker Case under color of state law constitutes Conspiracy under 18 USC 241--371". The said exhibit makes reference to provisions of the Welfare & Institutions Code, State of California, which violate the "due process" and "equal protection" provisions above referred to. Sec. 5128 denominates the proceeding as "civil", in a situation where the FBI maintains "criminal identification records" as a result of the proceeding. Sec. 5050 provides for the certification by two physicians, as the basis for the judge-employer to sign the interlocutory order providing for jury trial on demand but which in any event is used as the basis for the County Clerk's Index. The designation of "civil proceeding" and issuance of the interlocutory order upon certificate signed by two court-employed physicians, and the immunity provisions of Sec. 5047 creates a classification which approves discrimination to prevent "due process trial" and "jurisdiction determination".

There is attached as Exhibit "B" and incorporated by reference quoted Welfare & Institutions Code Sec. 5047, 5050, 5128, referred to above, but not intended to be exclusive of other unconstitutional provisions. Judge Karesh said of Sec. 5050, S. F. Chronicle 7-28-66 CCCA p. 2:

> "Judge Karesh said Section 5050 of the Welfare Code is "so vague that it can be used to imprison someone without due process of law".

There is att ached as Exhibit "C" and incorporated by reference a published document entitled "A Question for the Court and for Republicans", presenting facts of the Belli-Maloney situation.

There is attached as Exhibit "D" and incorporated by reference an excerpt from a copyrighted published document (Copyright Class A, Registration No. A-782176, July 14, 1965) filed as Exhibit "A" to Petition for Rehearing in 968 Misc., U. S. Supreme Court and filed in the record in 1 DCA 1 Civil 22754 and referred to in Motion to Augment Record and to Produce Additional Evidence in DCA 1 Civil 23371.

Said Exhibit "D" is presented to show that on December 20, 1939, appellant was a national bank association employee, who was employed unlawfully in interstate commerce and subject to the provisions and protections of 12 USC, all giving federal jurisdiction; and that the bank charter was forfeit for law violations under 12 USC. This naturally raises the question of violation ofstatutory duty by federal as well as state officials, with pertinent punitive penalties under federal and state laws, as to officials who permitted and failed to prosecute the law violations affecting the public interest.

Said exhibit is also presented to show that the deprivation of appellant's civil rights impaired her employment contract in contravention of Article I,

Section 10, Clause 1, United States Constitution, and that the object constituted violation under 18 USC 241 and 371.

The matter before this court is appellant's request for determination that the Superior Court issued the December 20, 1939, interlocutory order without jurisdiction and on that basis that the same was and is void, with a concomitant request for affirmative relief in the form of a nunc pro tunc order restoring appellant and her property to the situation obtaining prior to the December 20, 1939, interlocutory order, with clearance of resulting records, local and state and federal, and with nunc pro tunc vesting of property rights in California and Alabama with waiver of statutes of limitations and etc. and with immediate accrual of causes of action for losses and damages to be presented for prompt resolution by arbitration.

The situation as to the involved federal and state officials, courts and judges, constitutes wilful violation of Article VI, Clause 2, and violation of the guarantics under Amendment V, VI, and XIV, since there ensued a taking of life, liberty and property without due process of law and without just compensation by means of an unconstitutional statute, the provisions of which and the court practice concerning which constitute denial of equal protection of the law upon classification

discrimination based on denial of due process of law, and which said unconstitutional statute has been and is being used by involved federal and state officials, courts and judges, including the Department of Justice of the United States, to cover up crimes against the public interest, to-wit: the violation of the National Bank Act by Bank of America N. T. & S. A. with the full knowledge and consent of the Comptroller of the Currency whose administrative activities are subject solely to the control of the President of the United States and who in the past has had an Assistant who had served as a career-executive of said bank.

Reference to the Appendix of Appellant's Opening Brief, DCA 1 Civil 23371, will show exhibits involving violation of Constitutional guaranties, violation of Federal and California statutory law, attorneyship by a non-citizen Communist involving the factor of Federal Bureau of Investigation record-error, and raising the question of the inelligibility of Edmund Brown to be Governor of California in view of his having committed felonies against this appellant, to-wit: forgery and falsification of public records on the latter of which there is no statute of limitations for prosecution as under Penal Code Section 799, State of California.

Truly, this is a case-situation of inverse-crime,

similar to the principle of inverse-condemnation of property, where the appellant has been and is being subjected to the crime of conspiracy by involved federal and state officials, courts and judges, who are benefiting from the continuance of the crime which originated with the non-jurisdictional December 20, 1939, interlocutory order which was achieved for the purpose of preventing this appellant from being a witness to National Bank Act violations by Bank of America directors and officials, and which violations included the unlawful employment of this appellant in interstate commerce on a salary profit-earnings basis which minimized salary payments to a less than normal living standard of wages and which constituted discrimination in employment against appellant as a woman contrary to the provisions of the Fair Labor Standards Act.

The subject matter of the case requires the assertion of federal court jurisdiction. Reference is made to Walker v. Bank of America, 268 F 2d 16, and to Cohen v. Norris, 300 F 2d 24, in which it was held in the latter case that the decision of Walker v. Bank of America was reversed as to appellant's right to sue under 42 USC 1983, except for the fact that appellant did not state that the acts were under color of state law, while contradictorily in both decisions admitting that such claim was made.

It is significant to state that the matter of Walker v. Bank of America is entitled to be reasserted in view of the extrinsic fraud as shown in this proceeding, in view of the discoveries alleged as the basis for the determination of jurisdiction at this time, to-wit: the recording of the final order of June 14, 15, 1945; the forgery of Governor Edmund Brown as District Attorney of the stipulation of June 25, 1945, and the implementation of the aforesaid forgery into a court order by Judge Cronin; the court's lack of jurisdiction to enter the June 25, 1945, forged stipulation-order and the court's lack of jurisdiction to make and enter the February 1, 1946 order which is non-applicable to a denominated civil proceeding; and the falsification of the County Clerk's Index; and the violation of Government Code Section 26540 by the District Attorney, including the unauthorized removal of the February 1, 1946 order from file 18,160 and which order was replaced on appellant's motion by court order of August 19, 1966, for the purpose of supporting the record before this Court.

In the special circumstances of this case, it is pertinent to cite United States Bank vs. Northumberland Bank, 4 W. CC 108:

> The act of incorporation of the Bank of the United States gives the Circuit Courts of the United States jurisdiction of suits by and against the bank.

> This provision in the charter is warranted by the 3rd Article of the Constitution, which declares that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made or which shall be made under their authority".

This citation raises a question also as to the validity of the decision in Walker v. Bank of America on the basis of District Court dismissal under 28 USC 1348, which purports to unconstitutionally substitute state court jurisdiction for federal court jurisdiction in a situation where the federal entity, to-wit: Bank of America has by the repeated and continuing acts of National Bank Act violations forfeited its charter under Title 12 USC provisions, and which fact of itself constituted a basis for federal court jurisdiction to determine the issues.

Speaking of law violations of Bank of America, for which their charter is forfeit under 12 USC, Judge Hanley said in his footnote 16:

> If any purpose of appellees is factually asserted in these pleadings, it is the private one of furthering their own business plans and avoiding the expenditure of funds.

and, referring to the Walker case in Cohen v. Norris, Judge Hanley said:

> ...(at page 24) that the complaint contained no sufficient allegation that the act was committed under color of state law. Such an allegation is necessary to state a claim under 1983. ...

It was held in <u>US v. Buckner</u>, 108 F 2d 921, cert.

den., 60 S Ct 613, 309 US 669, 84 L Ed 1016:

> When once a connection was shown between defendant and conspiracy, evidence of earlier activities of the co-defendants tending to prove origin and existence of conspiracy was admissible against defendant.

It is clear in this case, as shown by Exhibit "D" that where appellant was on the payroll of Bank of America until January 23, 1940, the December 20, 1939, interlocutory order, the circumstances of which are told in detail in Appellant's Reply Brief, DCA 1 Civil 23371, Argument I:

> THE SUPERIOR COURT NEVER HAD JURISDICTION OVER THIS APPELLANT AT ANY TIME

impaired the obligation of appellant's employment contract with Bank of America under the provisions of 12 USC, which entitled her to the benefits of California Law and to damages under Federal Law, and that the said benefits are being withheld by the continuance of the matter under the falsified record involved in the matter before this Court.

It was held in Sambor v. Pa. (1928) 27 F 2d 406, appeal dism. 49 S Ct 93, 278 US 572, 73 L Ed 851:

> Federal Court has "jurisdiction" to determine cause based on claim of state law impairing obligation of contract.

It is apparent from examination of Respondent's Reply Brief that it has become the practice of California Justices in the Supreme Court and the District Court of

Appeal to maintain the record status quo of unconstitutional Welfare & Institutions Code proceedings, in which due process and equal protection have been denied. Hence, the Petition for Removal was filed to assure the legal safety of this appellant's civil rights.

As pointed out by appellant in "Appellant's Application to Disqualify All Judges of the United States Court of Appeals for the Ninth Circuit and to Invoke 28 USC 291 authorizing the Chief Judge to present a Certificate of Necessity requesting the Chief Justice in his official capacity (he being disqualified also) to designate and assign Temporary Judges from other Circuits to hear this case (28 USC 455)", Judge Joseph Karesh, who denied appellant's motion on December 17, 1964 and January 14, 1965, was CCP 170 and 28 USC 455 disqualified by reason of having represented J. Edgar Hoover, Director of the Federal Bureau of Investigation in his capacity as Assistant United States Attorney at San Francisco, in San Francisco Superior Court Action No. 383580, in which Judge Karesh discovered the facts of Governor Brown's forgery and the falsification of public records which remained unknown to this appellant until December 29, 1964.

Examination of Respondent's Reply Brief, DCA 1 Civil 23371 (page 2, second paragraph) shows that the District Attorney admitted the issuance of the

Order of June 14, 15, 1945, which became final because it was not appealed and the finality of which could not be affected by Governor Brown's forged stipulation-order of June 25, 1945, purporting to set it aside:

> On June 15, 1945, after appellant had filed a motion to set aside the order of December 20, 1939, the matter was submitted and the court entered its order vacating the December 20, 1939, judgment. This was entitled "Order Setting Aside Original Commitment" and was recorded in Volume 645 at page 131 of the Judgment Book of the County Clerk of the City and County of San Francisco. Copy of this order is attached hereto marked "Exhibit B".

As shown by Appellant's Opening Brief, Argument II:

> THE JUNE 14, 15, 1945 ORDER WAS A FINAL ORDER, CONCLUDING MATTERS AT ISSUE, WHICH ANNULLED THE DECEMBER 20, 1939 INTERLOCUTORY ORDER AND VESTED CAUSES OF ACTION UNDER FEDERAL AND STATE LAW, INCLUDING WELFARE AND INSTITUTIONS CODE SECTION 5047 FOR LACK OF PROBABLE CAUSE.

It was held in Maier Brewing Co. v. Pac. Nat'l Fire Ins. Co. (1961) 194 CA 2d 494:

> There can be but one final judgment in an action and that is one that in effect ends suit in court in which it is entered and finally determines rights of parties in relation to matter in controversy.

As shown by Appellant's Opening Brief, Argument IV:

> THE COURT ERRED IN DENYING APPELLANT'S MOTION.

An outstanding authority on opening and vacating void judgments is Los Angeles v. Morgan, 105 CA 2d 726, from which the following quotations are made:

> If the invalidity of a judgment is apparent on inspection of the judgment or judgment roll, the judgment may be vacated on motion at any time after its entry. (Peo. v. Greene, 74 Cal. 400)

As the record shows, appellant filed Notice of Appeal to the District Court of Appeal, State of California, on January 14, 1965, and then secured orders from the District Court of Appeal, Division One, in 1 Civil 22754, staying proceedings pending decision by the United States Supreme Court on her Motion for Leave to File Petition for Writ of Mandate, which was filed on February 11, 1965, to compel Judge Karesh to grant appellant's motion. The action of the United States Supreme Court was sought on the basis that the original December 20, 1939, interlocutory order was void because of the CCP 170 disqualification of the Court and Judge, by reason of the fact that the Judges of the San Francisco Superior Court were employers of involved medical examiners and on the further basis that the June 14, 15, 1945, order annulling the December 20, 1939, interlocutory order granting appellant's petition based on denial of due process and equal protection under U. S. Constitution Amendment XIV was the final order in Action 18,160. However, the Motion for Leave to File the Petition was denied.

Appellant filed Petition for Removal to the United States District Court on April 27, 1966, within 8 days after the District Court of Appeal denied Motion for Advancement in DCA 1 Civil 23371 and following the denial of Application for Ex Parte Order in a situation,

where appellant is entitled to relief-on-demand under the situation of the void orders here involved. In her Petition, appellant set out the fact that in view of (1) the involved felony of Governor Edmund Brown as District Attorney in the matter of the forgery of the June 25, 1945, stipulation and falsification of public records and (2) the CCP 170 disqualification of all state judges by reason of the Court-Judge employment of medical examiners under the Welfare and Institutions Code, it was impossible for her to secure resolution of the problem, the existence and continuance of which constitutes deprivation of civil and property rights.

Appellant cited the case of Stackhouse v. Zunts, CC La. 1883, 15 F 481, 4 Woods 171, involving the removal of an appellate proceeding, in which it was held:

> A suit which really amounts to "a new case arising on new facts, although having relation to the validity of a judgment" may be removed.

In support of this contention, appellant cited her discoveries ranging over the period from May 5, 1964, to December 29, 1964, when she discovered the falsified County Clerk's Index.

Appellant in the Memorandum filed May 9, 1966, in United States District Court No. 45049 cited 28 USC 1443, which satisfies the requirement of 28 USC 1447 (d) permitting appeal from Order Denying Petition for Removal by Judge Alfonso J. Zirpoli filed May 13, 1966.

28 USC 1443

Civil Rights cases.

Any of the following civil actions, or criminal prosecutions, commenced in a state court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) against any person who is denied or cannot enforce in the courts of such state a right under any law providing for equal civil rights of citizens of the United States or of all persons within the jurisdiction thereof.

(2) for any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 USC 1447 (d)

An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

In a situation where there has been concerted action to prevent appellant from being restored to her status prior to the issuance of the non-jurisdictional December 20, 1939 interlocutory order and where there has been concerted action to prevent her from having the benefits of the final order of June 14, 15, 1945, in San Francisco Superior Court No. 18,160, there has been requisite denial of equal protection of the law to support federal court jurisdiction.

But virtue of her inalienable rights as an ancestral American, this appellant was entitled to due

process and any judgment of any court or judge under any law in any jurisdiction in contravention of that right and in violation of the Supremacy Clause of Article VI, Clause 2, is void. The record shows that the said guaranteed due process was denied in the factor of the employer-judge, and in the factor of the setting aside of the final order by forgery to falsify the records, which constitutes crime under 18 USC 241 and 371 against this appellant and the people of the United States.

Likewise, the inability to secure hearing as to court jurisdiction under CCP 1916, which is accorded in other types of civil proceedings, by the CCP 170 disqualified Superior Court Judge and the failure to recognize the final order of June 14, 15, 1945, constitutes denial of equal protection of the law.

Since it is clear that the facts of this case will support judgment in appellant's favor by reason of extrinsic fraud factors, in Walker v. Bank of America, supra, and since one of the reasons for this action is to recover losses caused by the conspiracy of officials of Bank of America in conjunction with federal and state officials and judges, it is proper that this Court should have jurisdiction, since the conspiracy against this appellant is a National Bank Act violation under 12 USC, since the federal charter only authorizes the directors to do those acts which are in accordance with law.

The record in this case shows, as set out in Reply Brief, DCA 1 Civil 23371, Argument

THE SUPERIOR COURT NEVER HAD JURISDICTION OVER THIS APPELLANT AT ANY TIME

at page 11 thereof, clearly shows that there was complete denial of due process, ranging from deception to secure signing of the petition to deception in getting hold of appellant's body against her will which was tantamount to the crime of kidnapping, the issuance of void orders, and under the void orders holding appellant's body which still was tantamount to kidnapping, and then maintaining by fraud and conspiracy and crime false and frudulent records to cover up crimes at national and state levels of government and to permit criminals, to-wit: law violators, as Bank of America, to continue their crimes against the public interest in contravention of the United States Constitution and the laws enacted by Congress.

Referring back to Senate Document 39, and the citation of the Ordinance for the Government adopted July 13, 1787, appellant calls to the attention of the Court and Judges and ancestral Americans, the fact that, as stated in Art. 2 thereof, quoted on page 2 hereof, appellant was entitled to judgment by her peers or the law of the land. Appellant contends that her peers can only be those who like herself have by lawful lineal

inheritance by blood descent the vested rights as set out in the Ordinance of 1787. Appellant contends that the law of the land is the United States Constitution.

Under this analogy, appellant contends that later immigrants to the United States of America and their descendants are not her peers and that representatives of special interests and minority groups are not her peers, and not being her peers they have no right to act as Justices, Judges, or jury members to determine the matter of appellant's civil rights and the deprivation of those rights for purposes of Constitutional Law violation.

In the instant case, appellant has been subjected to Bank of America crimes perpetrated against law at the federal level by Italian leadership, and has been subjected to crimes by an Irish legislator, and has been subjected to crimes by Italian, French, Swedish and Scottish attorneys, and has been subjected to crimes by Irish and Jewish officials, and said crimes have been implemented and maintained by Holland, Irish, Negro, Italian, Jewish Judges, it being believed by appellant that all of them are probably first-generation Americans whose interests in their opinion are best served by developing power for minority groups at the expense of ancestral Americans. Such an interest constitutes CCP 170 and 28 USC 455 disqualification. Such is the interest

that is responsible for the continuance of this case as shown by Exhibit "A". And such is the interest that has been responsible for the unconstitutional discrimination as practiced by the United States Supreme Court in accordance with statutes purporting to establish discretionary choice of cases and which has no basis of authorization as to the Constitutional Rights of ancestral Americans under the provisions of the United States Constitution.

The asserted discrimination against this appellant as an ancestral American and as a member of the group of ancestral Americans, constitutes denial of equal protection of law which

(1) mandates Supreme Court of the United States jurisdiction; and

(2) permits Congressional Court jurisdiction as in this Court.

II

STATEMENT OF THE CASE

The CCP 1916 Motion (JR 29) -- requiring a showing of extrinsic fraud, a good defense, and freedom from negligence or fault -- to set aside an interlocutory order secured by denial of due process, and requesting affirmative relief, to-wit: clearance of all records at local, state and federal levels, nunc pro tunc restoration of all rights in California and Alabama, immediate accrual of causes of action with claims to be arbitrated, was presented by appellant to and denied arbitrarily by the Superior Court. (See Exhibit "F" to this Brief).

The motion was based on the following discoveries (JR 76, 79, 83, 108; Appellant's Opening Brief, p. 7, Exhibit "K"):

May 5, 1964	File 18,160 was not destroyed
May 10, 1964	February 1, 1946, order not recorded
July 15, 1964	Attorney Andersen did not sign stipulation
December 29, 1964	County Clerk's Index falsified

Four court orders are involved, the December 20, 1939, interlocutory order (JR 10), the June 14, 15, 1945, final order (JR 21), the June 25, 1945, forged stipulation-order (JR 22), the February 1, 1946, expungement order

(JR 27 and Exhibit "E" this Brief). There was introduced as a part of the extensive evidence to support appellant's motion for Exhibit "E", the following minute order, of which this Court may take judicial notice of the fact that the file was sealed and the record closed by the February 1, 1946, order, to-wit:

> Minute Book Volume _____ page 141, April 17, 1946. In re Claudia Walker, an alleged incompetent, No. 18,160. In this action, the court ordered the County Clerk to issue two certified and one exemplified copy of an order of court in the above entitled cause, made and entered February 1st, 1946.

The court may also take judicial notice of the fact that the February 1, 1946, order was the basis of a payment to appellant of $1,440.00 by the State Board of Control in 1949 (JR 76, 79, 83, 108, Appellants Opening Brief Exhibit "K", Appellants Reply Brief Exhibit "B")

There is also involved the County Clerk's Index (JR 28), which shows the June 25, 1945, forged stipulation-order as the final order in 18,160, which is intended to establish that the December 20, 1939, interlocutory order was valid when in fact and law the court had no jurisdiction to make it.

The required showing (JR 66-7) of extrinsic fraud, to-wit: appellant was on the payroll of Bank of National Trust & Savings Association until January 23, 1940, being unlawfully employed by the federal chartered bank in interstate commerce and entitled to up to

$6,000.00 in Workmens Compensation benefits, which were fraudulently concealed (See Walker v. Bank of America, 268 F 2d 16) (JR 32-3, 37), which precluded a transfer-commitment because of "lack of funds" (JR 42), and was a prospective witness to the bank's National Bank Act violations then under investigation by the Securities & Exchange Commission, and the object of the commitment was to prevent appellant from being such a witness, which was a violation under 18 USC 371; a good defence, to-wit: a letter by Attorney Belli (JR 40-1 wherein he falsely stated he served as attorney and admitted that he instigated the action because appellant consulted him about suing a politician (See Exhibit "C" this Brief), and the interlocutory Judgment (JR 10) shows he served as a witness against appellant after appellant asked him to be her attorney (JR 13-5); and freedom from negligence or fault, to-wit: Appellant's Reply Brief, pages 11-22, shows conclusively that due process was completely denied by reason of which the court never acquired jurisdiction over this appellant (See Exhibit "A" of this Brief) was made in the documents presented to the court.

On April 14, 1964 (See Appellant's Opening Brief, Exhibit "J"), appellant was informed through the Chief Administrative Officer of San Francisco that the

medical examiners were the employees of the San Francisco Superior Court, raising the CCP 170 disqualification issue in law, as set out in the opening brief at page 10. The interlocutory judgment (JR 10) shows that the judge signed the order prepared in the hand of one of the medical examiners after the issuance of a certificate by the medical examiners.

Since the letter from the Chief Administrative Officer of San Francisco as to the employment of the medical examiners by the San Francisco Superior Court Judges constituted the latest discovery of denial of due process, appellant presented this as her first argument in the opening brief, page 10.

Since the December 20, 1939, judgment was an interlocutory order and since the June 14, 15, 1945, order was regularly made on a review of the jurisdictional facts, to-wit: the denial of due process, appellant presented the argument that the June 14, 15, 1945, order was the final order in the proceeding (a court having jurisdiction to vacate its void orders, to-wit: the December 20, 1939 interlocutory order) and the court had no jurisdiction to implement the June 25, 1945, forged stipulation into a court order or to make the February 1, 1946 order. Appellant presented this as her second argument in the opening brief at page 11.

Appellant in her Argument III in the opening brief at page 12 showed that Attorney Andersen was not authorized in law to negate the June 14, 15, 1945, order and that it was a forgery, since he did not sign it. Appellant also showed that the February 1, 1946, order was Penal Code Section 1203.4 non-applicable to a civil proceeding.

Appellant in her Argument IV cited the case of Los Angeles v. Morgan, 105 CA 2d 726, showing that where want of jurisdiction appears on the face of the judgment or is shown by evidence aliunde, in either case the judgment is for all purposes a nullity and that if its invalidity is apparent it may be vacated on motion at any time after entry.

As shown by Exhibit "F" to this Brief (Reporter's Transcript, December 17, 1964 and January 14, 1965) the trial court stated that it had no jurisdiction to set aside the order. The transcript shows that there was no appearance by the District Attorney, who was served (JR 31, 69). The augmenting of the record by this transcript was approved by the District Court of Appeal on April 19, 1966.

Appellant's Opening Brief was filed February 1, 1966. The law is conclusive under the state of facts and appellant was entitled to immediate relief under

the arguments presented in her opening brief. Under Rule 17(b) appellant was entitled to decision on her brief alone. The District Attorney deliberately delayed filing for two months without any reasonable excuse and presented a brief pleading laches and showing that it is the practice of the State Supreme Court and the District Courts of Appeal in California to refuse relief from Welfare & Institutions Code proceedings on a claim of denial of constitutional due process.

Appellant's Reply Brief showed that the Respondent's Brief was unlawful under Government Code Section 26540 which prohibits the District Attorney from making defense of a crime, to-wit: forgery and falsification of public records as here involved, the latter carrying no statute of limitations under Penal Code Section 799 and being a disqualification of Edmund Brown to serve as Governor of California. Additionally, appellant presented record-proof of denial of due process (pages 11-22) and proof that the June 25, 1945 stipulation was a forgery (pages 23-29) and showed that the District Attorney is estopped to plead conclusive presumption and laches (pages 5-11)

The Court is asked to take judicial notice that the publication of documents in the Respondents Brief constitute contempt of the February 1, 1946, order

if it were valid in law, and appellant concludes that it was for this reason that the District Attorney removed it from the file and to support his false contention that the file was not sealed and that appellant was guilty of laches. It was to counteract this that appellant secured an Order (CCP 1953.02) which is Exhibit "E" to this Brief.

It is to be noted also, in view of the CCP 170 court-judge disqualification factor here involved, that in addition to Welfare & Institutions Code Section 5047 providing that the district attorney shall prepare the petition, (See Exhibit "B" page 1, this Brief) Government Code Section 26524 provides:

> Appearing for and representing court, judge, or constable. Upon request of any judge of the superior, municipal or justice court or constable, the district attorney shall appear for and represent the court or judge or constable if the court or judge or constable in his official capacity is a party defendant in any action.

It would appear that the forgery and falsification and unauthorized taking of documents has been induced as protective measures for the benefit of the court as well as the district attorney in this case. Such a situation constitutes complete disqualification for interest under CCP 170 and 28 USC 455.

In view of appellant's personal financial situation, based on 26 years of continuing losses,

including, rights, property, inheritances, age factors, prejudice, all caused by the records and the financial losses, appellant filed motion in the District Court of Appeal based on Los Angeles v. Morgan, supra, for advancement and to augment the record, which were heard on April 19, 1966. The motion for advancement was denied and the motion to augment was granted only as to the Reporter's Transcript (Exhibit "F" this Brief). Appellant then filed a motion for an ex parte order which the court denied.

On April 28, 1966, appellant filed a Petition for Removal to the United States District Court, Action No. 45049, with an Affidavit of Prejudice and requested the appointment of judges outside of the State of California.

In the Petition for Removal, it was stated that the falsified record constitutes a hazard to appellant's life, property and her capacity to earn a living and her right to make recoveries against Bank of America under her employment contract under 12 USC which was protected by Article I, Section 10, Clause 1 of the United States Constitution. Appellant pleaded:

> The right to earn a living is a federally protected right and one of the objects of appellant's political campaign is to place herself in a situation where she can best use her personal abilities, knowledge and experience for the public good, and for which she would receive payment for services.

In her Memorandum filed May 9, 1966, appellant cited 28 USC 1443 and 42 USC 1983 (Walker v. Bank of America, 268 F 2d 16; Cohen v. Norris, 300 F 2d 24) since the within discoveries of extrinsic fraud will permit the reopening of Walker v. Bank of America, since the record clearly shows that the acts have been done under color of state law, which is the object of the falsified County Clerk's Index to deprive this appellant of her civil rights and property contra 18 USC 241 and 371, the latter involving appellant's capacity as a witness to Bank of America's National Bank Act violations which is a 12 USC basis for the forfeiture of its charter if the Comptroller of the Currency were complying with the law under the direction of the President.

28 USC 1447(d) authorizes review by appeal in this Court of Appeals.

Attention is called to Appellant's Application to Disqualify all Judges etc., lodged herein on September 31, 1966.

III

ERRORS URGED

1. The law and motion Court erred in denying appellant's motion under CCP 1916.

2. The District Court of Appeal erred in denying motion for advancement.

3. All California Superior Court Judges, past or present, whether on state or federal benches are CCP 170 disqualified for interest by reason of being employers of medical examiners under the Welfare & Institutions Code.

4. As an ancestral American, appellant's vested rights, as stated in the Ordinance of 1787, are protected by the United States Constitution by Art. VI, Cl. 2, and Amend. V, VI, XIV., Sec. 1, and cannot be alienated except by her peers or the law of the land - her peers being only those jurists who have the same vested rights by reason of the same ancestry and the law of the land being the U. S. Constitution.

5. As an ancestral American, whose vested rights as aforesaid, have been transgressed by the State of California and its agents in collusion with the directors of the federally chartered Bank of America, by means of the unconstitutional statute, to-wit: Sec. 5047, 5050, 5128 (Exh. "B" this Brief) of the Welfare & Institutions Code, to effect criminal conspiracy as per 18 USC 241 and 371, appellant is entitled to determination in the U. S. Supreme Court., under Art. III, Sec. 1. Cl. 1, Sec. 2, Cl. 1 and 2.

6. The practice of California Courts in cases where due process has been denied (See Exh. "F" this Brief and Respondents Brief,) in proceedings under Welfare & Institutions Code, is in violation of Article VI, and constitutes denial of equal protection under Amendments V, VI, XIV., Sec. 1 - and constitutes a valid reason to petition for removal to the federal forum.

7. Sec. 5047, 5050, 5128, Exhibit "B" this Brief, are unconstitutional, as aforesaid.

IV

ARGUMENT

1. The law and motion court had power and the duty to determine jurisdiction under CCP 1916, and the law of the case is conclusive and relief to appellant was immediately available.

> The issue of jurisdiction of a trial court may be raised at any time or place where the lack of jurisdiction appears.
> Schuler-Knox v. Smith, 62 CA 2d 86, 144 P 2d 47

> CCP 1916. Manner of impeaching record. Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, or collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings.

Appellant made the requisite showing of extrinsic fraud, a good defense, and freedom from negligence or fault.

The April 14, 1964 letter from the Chief Administrative Officer (Appellants Opening Brief, Exh. "J") advising that the medical examiners were employees of the Judges of the San Francisco Superior Court is conclusive of CCP 170 disqualification for interest.

An impartial court is a substantial right of due process as held in Inland Steel Co. v. Nat'l Labor Rel. Bd. CCA 7, 109 F 2d 9, 20; and the certificate by two physicians is devoid of due process elements as

held in In Re Cornell, 18 A 2d 304, 306, 111 Vt. 525, both quoted in Appendix "I" to the Opening Brief.

As shown in this brief at page9, it was held in Denton v. Conn., Ky (1964) 383 SW 2d 681:

> Bare accusation of insanity acts is not proper basis for classification and in a lunacy inquest manner of proceeding, rules of evidence and burden of proof should be the same as those in any criminal or quasi-criminal trial.
>
> It was reversible error to admit evidence of doctors by certificate or affidavit as to mental condition of defendant in lunacy inquest.

The following case is conclusive as to this case:

> When statutes expressy forbid persons performing judicial functions from acting where they are interested, such interest, if subsequently shown, renders the decision void.
> United RE & Tr. Co. v. Barnes (1911), 159 C 242

The December 20, 1939 order being an interlocutory order, the June 14, 15, 1945, order was a final order and was not appealed. This statement is supported by the following cases:

> Where anything in nature of judicial action is necessary to final determination of rights of parties, judgment is interlocutory.
> Scarbery v. Patch (1959) 170 CA 2d 368
>
> If unsuccessful party to action...has been prevented from fully participating therein, there has been no true adversary proceeding and judgment is open to attack at any time.
> Rogers v. Mulkey (1944) 63 CA 2d 567
>
> There can be but one final judgment in an action and that is one that in effect ends suit in court in which it is entered and finally determines rights of parties in relation to matter in controversy.
> Maier Brewing Co. v. Pac. Nat. Fire Ins. Co. (1961) 194 CA 2d 494

The above arguments have been set out in Appellant's Opening Brief in Arguments I and II at pages 10 and 11 Exhibits "J" and "I" therein referred to.

It can be seen that the June 25, 1945, stipulation was not signed by appellant's attorney but by the deputy District Attorney (JR 22) and is a forgery (Appellant's Opening Brief Exhibit "G"). The name of Anderson is misspelled, and his representative told appellant he did not sign it.

> It is a well settled rule of law that "the implied authority of an attorney ordinarily does not extend to doing of acts which will result in the surrender or giving up any substantial right of the client... (7 CJS 897)
> Redsted v. Weiss, 71 CA 2d 660, 663

> A forged deed is an absolute nullity and imparts when recorded no notice to anyone.
> Keley v. Collins, 41 C 663

Reference to Welfare & Institutions Code Sec. 5155 "Penal Code and other laws unaffected" shows that Penal Code Section 1203.4 was non-applicable:

> Law must be applied as it is written and it cannot be extended by judicial interpretation.
> Chapman v. Aggele (1941) 47 CA 2d 848

Again, the following case is conclusive:

> An order setting aside the order vacating the judgment would in effect be a reversal of an adjudicated issue...In Holton v. Greif, 144 Cal. 521, 524, the Court said: "The decisions of this court are numerous and uniform to the effect that a judgment or order once regularly entered can be reviewed and set aside only in the modes prescribed by statute..."
> Fallon v. Superior Court, 33 CA 2d 48

The above are cited at page 12, Opening Brief.

Again as shown, Los Angeles v. Morgan, is conclusive in this case (105 CA 2d 726):

> If the invalidity of a judgment is apparent on inspection of the judgment or judgment roll, the judgment may be vacated on motion at any time after its entry. (Peo. v. Greene, 74 Cal. 400)
>
> Whether the want of jurisdiction appears on the face of the judgment or is shown by evidence aliunde, in either case the judgment is for all purposes a nullity - past, present and future. (Hill v. City Cab etc. Co., 79 C 188). Nothing can be acquired or lost by it, it neither bestows nor extinguishes any right...it neither binds nor bars anyone. All acts performed under it and all claims flowing out of it are void...No action upon the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislative or other department of government can invest it with any of the elements of power or of vitality. (1 Freeman on Judgments, 5th ed., Sec. 322 pp. 643-644)

Hence, the Court erred. The error was deliberate, as shown in Exhibit "F" to this brief, being a refusal to apply the law. The reason is obvious. Judge Joseph Karesh as all other Judges of Superior Courts in California is CCP 170 disqualified for interest, and in his case he is disqualified under 28 USC 455 having been an Assistant United States Attorney representing J. E. Hoover, Director of the Federal Bureau of Investigation, named as a defendnat in San Francisco Superior Court Action No. 383580. His prejudice is shown in his comments concerning the Governor and involved parties Belli and Maloney, and his attempts to bemean this appellant as to writing letters.

2. Under the law of the case, which was obvious, it was incumbent upon the District Court of Appeal to advance the hearing, in view of the seriousness of the matter to this appellant's welfare, in a situation involving the crime of forgery and falsification of public records constituting a hazard to appellant's civil and property rights as alleged and shown in the record before the Court. The Respondent's Brief shows that the District Attorney on page 2 admitted the fact of the June 14, 15, 1945, order. Also, the brief shows that the District Attorney made no defense to the CCP 170 disqualification issue or to any of the contentions in law advocated above, which are conclusive of the law of the case. Since the matter was one to be settled on motion on application of the appellant, appellant was entitled to immediate hearing for the protection of her civil and property rights, when the court was on notice that she was in jeopardy because of the continuance of the situation. When the court failed to act as requested by appellant, she had a right to removal to the federal forum, in a situation where the case-history and this refusal to advance and where the District Attorney presented a brief showing cases in which relief was denied under Welfare & Institutions Cases where judgment had been issued in a situation where due process was denied.

The obvious conclusion is the CCP 170

disqualification for interest as applicable to past and present Superior Court Judges, the Justices of Division III having been so involved as employers of medical examiners under the Welfare & Institutions Code, and further as set out in Appellant's Application To Disqualify All Judges, etc., particularly Section II thereof entitled "The Court-Judge Disqualification Factor extends to Justices of the California District Court of Appeal" which is incorporated herein by reference.

Appellant points out that she did not ask Governor Edmund Brown, as District Attorney, to commit a crime but demanded that he clear the record, and she had no knowledge of the fact that he was associated with minority groups whose interests are contrary to those of this appellant in the national scene, to-wit: he is opposed to the interests of ancestral Americans as this appellant.

3. The issue of CCP 170 Court-Judge disqualification is embraced in Argument I, Opening Brief, page 10, and hereinabove, as well as in Appellant's Application to Disqualify all Judges as etc. as hereinabove referred to, which is incorporated by reference.

4. Appellant's ancestral rights are set out at pages 1-2 of this Brief in provisions of the Ordinance

of 1787 and in Exhibit "L" of the Opening Brief. Article VI, Clause 2 is cited at page 3, Amendment V is cited at page 8, with Amendment XIV, Section 1, and Amendment VI is cited at page 9.

5. Appellant's ancestral rights under Article III are set out at page 4.

6. The Respondents Brief and Exhibit "I" and Exhibit "A" give proof of the fact that it is the practice to refuse relief in equity in the California Courts with specific reference to Welfare & Institutions Code Cases, which constitutes denial of equal protection, and which is available in the federal courts, as shown at pages 5-6.

It was held in Goldman v. Postal Telegraph, cited at page 6 (DC Del. (1943) 52 F Supp 763:

> Where constitutional rights are involved, it is the duty of federal courts to secure their protection even though state courts may fail to do so in analogous situations.

7. As indicated, provisions of Sec. 5047, 5050, 5128, Exhibit "B" this brief, are unconstitutional, being in violation of Article VI, Cl. 2, and Amendments V, VI, XIV, Sec. 1, all as aforesaid in this Brief and hereinabove in this Section IV. Hence the proceedings in this case are void.

THE CONTINUANCE
OF THE
DEPRIVATION OF CIVIL RIGHTS
IN THE WALKER CASE
UNDER COLOR OF STATE LAW
CONSTITUTES CONSPIRACY
UNDER
18 USC 241--371

Before judging the court and the judges
And proving the accusation as made,
We must first examine into the facts
And then consider the aspects of law
As to jurisdictional specifications
Under our Constitutions and statutes,
To prove the truth of our findings
For the civil proceeding in question.

A civil proceeding is a matter of law,
And under Sec. 5, Constitution Art. VI,
The Superior Court has jurisdiction.
And Sec. 5128 of WI Code states --
That trial shall be as in civil causes,
And Sec. 6610.3 of WI Code states --
As is true in all civil proceedings,
On request, the proceedings shall cease.

Court-jurisdiction under statute law
Is defined in legislative specifics,
And Sec. 1917 of CP Code states --
That jurisdiction to sustain a record
Must include cause, parties and things,
And Sec. 1916 of CP Code states --
A judicial record may be impeached
On a showing of failed jurisdiction.

Judge-qualification under statute law
Is defined in legislative specifics,
And Sec. 170 of CP Code states --
No judge shall preside in a proceeding
In which he is an interested party
And, on finding that such is the case,
Is directed to file a case memorandum,
Setting forth his disqualification.

EXHIBIT "A"

Court-procedure under statute law
Is a judge-mandate on a check-point basis,
And Sec. 1858 of CP Code states --
The court must follow the statute words
Without additions, omissions, or changes,
And Sec. 1859 of CP Code states --
The legislative intent is controlling,
Concomitant with intentions of parties.

Law-application of court jurisdiction
Is dependent on Constitution provisions
For due process and equal protection
And, when the specifics of statute laws
Contravene rights that are guaranteed,
Then the statute specifics must yield
To the constitutional law limitations
To protect civil rights of the parties.

It is the sworn judicial duty of judges,
As defined in their own Code of Ethics --
To support Constitutions and laws
And observe limitations and guarantees,
To abstain from personal participation
In matters involving their interest,
To diligently ascertain facts and law,
And to administer law with integrity.

It is the statutory duty of attorneys,
As defined in legislative specifics
As set out in Sec. 6068 of BP Code --
To support Constitutions and laws,
To maintain only actions legally just,
To abide by the truth in proceedings,
To defend clients against charges made,
And to keep inviolate client-confidence.

While the written law intends protection,
The law application denies protection,
And under provisions of WI Code --
We have a so-called civil proceeding,
With deprivations of a crime proceeding,
Without the protections of crime-law,
And, as a basis for which, charges made,
Unproved at a trial, mean life ruination.

Without notice, court-decreed illness
Causes imprisonment and crime-records,
The taking of property without consent,
Destruction by law of the life-forces,
And life-time damage to one's reputation.
And, after the loss has been suffered,
Officials conspire to avoid liability
And also to vitiate legal retrievement.

And now to the case at issue --

'Judicial Fairplay', the essence of law,
Is used by jurists in foremost decisions.
And yet, this case grew out of deception.
I remember the date, December 19, 1939.
I went to S. F. Hospital for one reason,
As I said I would, to ask about insulin,
And, sensing danger, I demanded to leave,
And then, I was served with a Petition.

On reading the Petition, I made demands
To be allowed to leave the place at once,
To see an attorney to protect my rights,
And I demanded attention to my demands,
And, instead of responding to my demands,
For their own protection as well as mine,
Medics pawed and doped and insulted me,
And tied me to a mattress on the floor.

The next day an attorney talked with me,
And promised to get me a trial by jury.
But, on hearing, he witnessed against me,
And over all my objections and demands,
Two medical examiners signed a certificate,
The judge signed an interlocutory judgment,
Allowing jury trial in 5 days on demand,
And next morning, I was taken to Stockton.

Before leaving, going, after arriving,
And during the next year of my life,
I continued demanding my legal rights
In every way I could possibly think of,
Screaming my demands into day and night,
Until finally someone heard and acted --
A man outside told the superintendent
To get me an attorney, or else he would.

All WI Code specifics were ignored --
Termination of proceedings on objection;
Definition to be proved on civil trial;
Presentation of Petition by the D. A.,
Based on pre-investigation of facts;
Medical examination before certification;
Court-appointment of a defense attorney;
Finance-status, hearing, jury, trial.

The law-critique was the first 5 days.
All demands should have been honored.
The D. A. should have determined facts.
Medical examination should have been made.
Legal defense should have been planned
And finance-status factually determined.
All of this, climaxed with trial by jury.
And Stockton should have heeded demands.

The court's CCP 170 disqualification
Was brought to attention April 14, 1964,
By a letter of the Chief Administrator,
Advising that Judges of the Superior Court
Were employers of the medical examiners,
Thus making the judges interested parties,
Since Court Judgment was made in reliance
Upon their 'expert-witness' certificate.

The attorney's BPC 6068 violation,
Deprived the right to counsel and defense.
We were Young Republican state directors.
The record shows the attorney at witness.
He advised Stockton he served as attorney,
And admitted initiating the proceedings,
After I had consulted him as an attorney
About improprieties of a state politician.

The medical examiners violated WIC 5055,
In not making personal examination
As a basis to determine certification.
The record shows their reliance upon
The Stanford Hospital recommendation
Of a 4th year student and 1st year interne,
In opposition to a 1st year resident,
And overriding a rating of 140 IQ.

The non-determination of finance-status --
The Stanford December 18, 1939, report:
"Transferred via S. F. H. to Stockton"
For lack of $200. to pay for 6 weeks --
Violated my right to Workmen's Compensation
Based on 12 years Bank of America service,
For up to the maximum sum of $6,000.,
With dependency support for my mother.

The District Attorney's WIC 5127 violation,
Initiating the civil rights deprivation,
Without careful fact-determination,
Precluded presentment of the Petition
To strip a girl unlawfully of civil rights
On a basis of charges falsely propounded,
By record-showing to make taxpayers pay,
In lieu of Workmen's Compensation Insurance.

The Superior Court's WIC 5050.8 violation,
In neglecting the check-point procedure,
Set by law for Constitution protection,
Caused the creation of unlawful records,
Based on filing an Interlocutory Judgment,
Handwritten by the Court medical examiner,
Which has kept banking crimes concealed
And deprived me of property for 25 years.

The record of my bank-career employment
From October, 1928, to January 23, 1940,
Showed that I was an AIB honor-graduate,
Employed at a salary of $110. per month,
Because of national bank discrimination
Against women--who left to get married,
Assigned to an interstate commerce entity,
On a salary-profit bank-earnings basis.

While Bank of America was claiming to be
A Transamerica Corporation subsidiary,
It was in fact, and unknown to me then,
Transamerica's under-cover entrepreneur,
Engaged in National Bank Act violations,
Which created an IC Sec. 332 situation,
Vitiating Workmens Compensation Insurance
Carried in Transamerica for concealment.

Due today are multi-millions of dollars
In damages to citizens of state and nation
Defrauded by the bank's NBA violations --
For over-5-year-realty-holding profits
Plus sale-retentions of mineral rights,
For calling 100% joint stocks for 60%,
For engaging in interstate loan financing,
And using federal funds for speculations.

The bank's charter is 12 USC 93 forfeit,
Hence, continuance dependent on silence.
I wondered often about the appraiser,
Who was overloaned on land and sheep,
Who was pressured into a bank holdup,
And, after arrest, found hanged in jail,
Leaving behind him a wife and two boys --
His testimony could have broken the bank.

Was I too the victim of silence required --
My trial could have broken all silence.
Hence, my life had to be misconstrued.
How handy, a legislator's organ-popping --
To halt my prospected radio program,
Designed by me to show people the way
To solve problems then being created
By unlawful practice in bank finance.

In July, 1939, it was stated in the news
That Transamerica was planning a suit
To keep loan data secret from the SEC.
All bank employees wanted investigation,
And I advised SEC of known violations,
With the idea of getting them stopped.
When bribed SEC attorneys reported it,
I was forced to resign October 23, 1939.

The officials gave me an alternative,
They would allow me to resign for illness
With my salary to continue 3 months,
Or else blackball me from all employment.
Although stunned almost to paralysis,
I knew I had done the right thing,
And when I left the bank in October,
SEC Examiners were checking altered books.

I was rebellious over what had occurred
And ill from years of incessant typing,
But I tried to maintain my composure
Until I could figure out what to do.
Bank interference with my radio program,
Caused by officials talking against it,
Had dissipated all my promised support,
But I kept on taking my voice lessons.

On salary-leave to January 23, 1940,
Unemployment insurance not yet available,
I started searching for another position,
But found the work of typing impossible,
And being too worried to enjoy vacation,
I tried awhile to divert my attention
By social interest, consistently spoiled
By oversexed tactics of tennis society.

The worst mistakes in a moment are made,
In exhaustion, I accepted suggestion
To go into Stanford for a couple of weeks,
Where I expected to counsel on problems.
My family physician and his associate,
A tennis club member, in active conspiracy,
As shown in a letter kept secret from me,
Arranged for the medical recommendation.

The Stanford stay was a medical horror,
Without psychiatric benefit of any kind,
With constant bombardment of questions,
Recorded with untrue answers and comments,
For the purpose of aiding conspiracy,
For propounding false medical report,
To induce by fraud my dependent mother,
Into signing the petition for court.

When Stanford demanded $200. for 6 weeks,
Alternative to free state hospital care,
My mother consulted an attorney I knew,
Who wrote a scandalous notice of illness,
Advising the bank of my need for $200.,
Which officials promptly by phone refused
Concealing by denial my compensation right
And approving free state hospital care.

In Stockton a year, I screamed for rights.
I was pawed, ducked, wrapped, strapped,
And, after warm baths, put in cold rooms;
My finger-prints taken for FBI records;
My organs demanded for free-sex indulgence,
Saved only by threats to refugee doctors;
Injected with insulin, reducing blood-sugar
To danger-level, from which I still suffer.

All wrong outside--my mother was evicted,
When my brother did not pay the rent,
With my furniture stored in a basement;
And guardianship instituted in Court,
Without hearing, to save sterilization,
The attorney for costs taking insurance
And funds of half-brother, ending regard,
My mother selling realty for food, $100.

A memorial to the horrors of Stockton --
I met a friend from San Jose High School,
Who told me about her baby just born,
And her two other sweet little children.
She worried because the doctors told her
That they someday would be locked up too.
I told her that the doctors were crazy.
Later, she smothered them to save them.

Freed from Stockton December 6, 1940,
I was weak, sick, and angry beyond words --
Experimental insulin, the blackmail price
To get my body away from the awful place.
My weight was down from 145 to 105 pounds,
And stomach-cramps daily doubled me over.
On leaving, I was cajoled and threatened
But I was determined to fight for right.

Unemployment insurance had then expired,
But I was offered a job doing typing --
I refused social-worker home-refuge,
And $10. a week from Community Chest.
I then purchased a portable typewriter
And wrote the story yet fresh in my mind.
I demanded investigation by officials
Of county, state, nation -- all refused.

I then used the report to demand release
From the Stockton Hospital Superintendent,
Who violated law in ignoring my demands,
Being restored to capacity April 23, 1941
By the Court in the guardianship action.
Every day though ill, I kept on working,
And continued demands for legal redress,
Being refused evidence access and action.

In 1942, I worked for the ex-president
Of the bank, who recommended me highly,
And wrote a biographical series for U. C.
In 1943, Dr. Wilbur gave me a scholarship
At Stanford, where I stayed 6 months --
My brother refusing his mother allotment,
My half-brother diverting funds due me;
Afterward, I went into publicity work.

D. A. Candidate Brown made me a promise,
If he were elected, he would investigate.
But, after election, on facts presented,
As D. A., he refused to take any action.
I wrote to the Superintendent at Stockton,
Who denied my attorney and trial demands,
I placed a newspaper ad, without finding,
The man who had demanded attorney for me.

I then filed a claim against the State
At Sacramento, with the Board of Control,
And on Attorney General's opinion denied,
On the basis of the letter of attorney,
Who stated he was attorney in proceedings,
And that the hospital promptly responded
And that the 5-days demand under WI 5125
Should legally have been made by attorney.

The Board of Control made an admission,
The hospital record showed my demands
All during the year I was held by them,
Proving the hospital statements untrue.
For evidence, I was given the record,
Told to get an attorney and go to court,
And get an order setting the record aside,
And then they would settle my claim.

In San Francisco, I engaged an attorney,
Not knowing he was in the enemy's camp,
His wife, a Stanford medical staff member,
And he, attorney for the People's World,
Who defended an accused-Communist woman,
Who was 'Mrs.' my name, and whose record
The FBI confused with my fingerprints --
Which barred him from being my attorney.

It was during U. N. Conference time,
And I was publicist for S. F. Unit, AWVS.
Motion and verified petition were filed,
On due process denial voiding jurisdiction,
And the Court issued order, June 15, 1945,
Annulling, vacating the original record.
When the attorney advised it was cancelled,
I was surprised but he promised rehearing.

Behind my back and without my knowledge,
A stipulation was filed 11 days later,
And made into court order, June 25, 1945,
Setting aside the order of June 14, 1945,
Prepared on D. A. Edmund Brown's paper,
Signed in the handwriting of a deputy,
Who signed the name of my attorney's firm,
Unauthorized either by me or by the law.

Petition-denial on September 12, 1945,
Resulted in Grand Jury hearing in October,
The D. A. being ordered to clear records.
The D. A. then made an alternative proposal.
He said he would ruin me with litigation,
Unless I released the involved parties,
But, if I did, he would expunge the records
And support a $10,000. claim bill for me.

Prudence seemed to demand my acceptance,
As D. A. support could win the claim bill
And this amount would reestablish me,
And I could then go on to other things.
I signed the release on January 30, 1946,
And the attorney and D. A. the stipulation,
And Court Order issued on February 1, 1946,
Setting aside and expunging the record.

In a matter of days, I was upset to see
Items in Herb Caen's Chronicle column
That the District Attorney, Edmund Brown
And Melvin Belli, railroading attorney,
Were closely involved as personal friends.
March 2nd -- Belli reversing decisions,
March 15th -- Announcing Belli handling
The Republican D. A. Pat Brown campaign.

At once, I sought clearance of records
With copies of the expungement order.
All sources complying, except the FBI,
Which refused fingerprints surrender,
But Congressman Havenner's objections
Revealed name-confusion as mentioned
And Mr. Hoover apologized June 6, 1946
And fingerprint records were released.

At once, I began work on the claim bill,
Being told the release would prevent it.
The D. A.'s office on January 11, 1947,
Gave me a letter stating that the release
Did not include the State of California,
Thus clearing the way for introduction,
And pendency of the bill was announced
In Herb Caen's column January 28, 1947.

Quite interesting the fact, the attorney,
Who handled the guardianship proceeding,
Failing to collect Workmens Compensation,
Garnering my property not for me but costs
Of unlawful proceedings in Superior Court,
Wrote Board of Control on August 1, 1947,
Opposing for himself and Bank of America
Approval of my claim bill for losses.

In San Francisco, I engaged an attorney,
Not knowing he was in the enemy's camp,
A wife's cousin of claim-opposing attorney,
A friend of 'forged stipulation' deputy,
A recipient of case referrals of D. A.
And $30,000. case from politician involved,
His firm opposing my mother-support case --
Which barred him from being my attorney.

After hearings held in the legislature,
With WI Code stiffened for protection,
And $2,500. suggested for $10,000. promised,
Amended claim was filed on July 2, 1948,
Under direction of the involved politician,
Which was cut to $2,000. on August 18, 1948,
And, on attorney's failure to attend hearing,
Was cut to Bank-of-America-salary, $1,440.

On learning I would not receive $10,000.,
I started rechecking my case situation,
And first learned my mother had attempted
To claim Workmens Compensation for me
And that, after notice of illness given,
The bank concealed existence of right
And withheld the tender of medical care
To accomplish signing of court petition.

I found the release CC 1668 unlawful,
It being against the policy of the law
For parties seeking to avoid liability
For acts of fraud and wilful injury
To demand release from parties injured.
But I was unprepared for demand-denial
For illness notice and bank refusal,
By attorney, State Bar, Supreme Court.

I filed a complaint on January 26, 1949
In the Superior Court at San Francisco
For malicious prosecution under WI 5047,
Requesting the Court to appoint attorney,
The request ignored and demurrers upheld,
After months of delay waiting decision
In the IAC proceedings then still pending,
As per my statement of February 26, 1951.

I went to Probate Court on March 4, 1949,
Demanding the notice and bank refusal,
But Attorney Brouillet denied facts stated,
Deriding my object to sue Bank of America,
And Bank Attorney Schilling, there present,
Took my papers from the court with him,
And the judge threatened me with contempt,
If I came into court again on the matter.

My IAC application filed December 6, 1948,
Claiming concealment tolled limitations,
Against Transamerica and Bank was defended
By Hartford Accident & Indemnity Company
And State Compensation Insurance Fund,
Which by pleading statute of limitations
Secured denial of Commission June 11, 1950,
And District, Supreme Court Petitions.

Brouillet estate attorneys delivered
Illness notice, refusal, on November 9, 1953,
And I appealed to Congressman Mailliard,
Who introduced HR 7850 on January 27, 1954,
On FBI confusion, heard on May 19, 1954,
Which was supported by Congressman Burdick,
But was denied by Judiciary Subcommittee,
On Attorney General's claim of no injury.

Walker v. Bank of America, 268 F 2d 16,
Filed in District Court, October 25, 1955,
Based on receipt of the Brouillet facts,
Was dismissed by Court on January 28, 1958,
And Circuit, Supreme Court Petitions denied,
Under 28 USC 1348, which by law deemed
A national bank to have state citizenship,
And failure to state a federal claim.

Injunction complaint filed June 30, 1958,
To compel the Comptroller of the Currency
To recall the charter of Bank of America,
On the basis of 12 USC NBA violations,
Under Sec. 24, lawful action limitation,
Under Sec. 93, charter-forfeit provision,
Was denied by Judge Pine November 3, 1958,
Stating Comptroller's action discretionary.

Injunction complaint of December 15, 1958,
For silence under February 1, 1946, order,
Resulted in dismissal on filed objections
By state-federal-medical-bar attorneys,
On grounds I was not federally entitled
Under the expungement order in question,
And USDC still continues Rule 59 motion
For showing original proceeding invalid.

IAC proceedings reopened on certification
By the Medical Director on March 13, 1961
Of 30% disability from chronic residuals
Of a physical nature caused by typing work,
The Referee finding on August 22, 1961,
That the contentions as stated were true
And that physical complaints in question
Were caused by bank employment, 1928-1939.

I made IAC discovery on April 25, 1961,
That Bank of America, actual employer,
Had hired me out on salary-profit basis,
IC-332 vitiating compensation insurance.
But the Referee denied reconsideration
For jurisdiction expired on June 11, 1950,
And reconsideration precluded by LC 5804,
District, Supreme Court Petitions denied.

In order to qualify for federal injunction,
I prosecuted an action in Superior Court,
And therein discovered on May 5, 1964,
Forged-stipulation-order of June 25, 1945,
And expungement unrecorded, on May 10, 1964,
Showing record-validity of unlawful order
Set aside by final order of June 14, 1945,
Voided by D. A.'s forgery on June 25, 1945.

Pursuing court proceedings in question,
Examination of certified copies secured,
Proved June 25, 1945, stipulation a forgery
By the San Francisco District Attorney,
And still later on December 29, 1964,
I discovered the County Clerk's Index,
Finding expungement PC 1203.4 authorized
WIC 5155 nonapplicable to civil proceedings.

Now I find Walker, 268 F 2d 16, disapproved
on civil rights issue by 9th Circuit Court
In the Cohen v. Norris case, 300 F 2d 24,
In which analysis made of the Walker case
Alleges the failure to claim rights denied
'Under color of state law', as required --
So I shall try again on extrinsic fraud
By me discovered on December 29, 1964.

The problem now, Superior Court admission
And CCP 1916 voidance for non-jurisdiction
Of original December 20, 1939, proceedings,
Implementing the June 14, 1945, order,
Annulling December 20, 1939, proceedings,
Which under CCP 963 became a final order --
The June 25, 1945, D. A.-Court 'forgery',
Being subject to PC 799 felony prosecution.

Dated: September 23, 1964
San Francisco, California

CLAUDIA WALKER

Demand is hereby made upon the San Francisco Grand Jury for an indictment for criminal prosecution of officials involved in the June 25, 1945, 'forgery', and their fellow-conspirators, as allowed under PC 799.

This document will be filed forthwith as Exhibit "A" to an Addendum to Petition for Writ of Prohibition filed in the United States Suprene Court, Washington, D. C. to disqualify Judges of the San Francisco Superior Court from presiding in proceedings involving this situation.

Declaration of Service:
This document has been served by personal delivery and/or postpaid mailing at the San Francisco Post Office, California, on September 23, 1965, addressed to the following:

Honorable Joseph Karesh, City Hall, San Francisco
Governor Edmund Brown, State Capitol, Sacramento
Attorney General Lynch, 500 Capitol Hall, Sacramento
District Attorney Ferdon, 850 Bryant St., San Francisco
San Francisco Grand Jury, City Hall, San Francisco
Board of Supervisors, City Hall, San Francisco
Honorable James Eastland, Chairman, Judiciary Committee, U. S. Senate, Washington, D. C.
Honorable Emanuel Celler, Chairman, Judiciary Committee, House of Representatives, Washington, D. C.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California, September 23, 1965.

CLAUDIA WALKER

*Denied Nov. 16, 1965, with consent, following discovery that February 1, 1946, order was non-applicable and non-jurisdictional.

WELFARE & INSTITUTIONS CODE
Sections 5047, 5050, 5128

Sec. 5047

Petition for examination of mentally ill person; Who may file; Preparation of petition and forms; Civil and criminal liability. Any person may file in the Superior Court a verified petition that there is in the county a person who is mentally ill and in need of supervision, care or treatment, and asking that examination be made of the mental health of the person, and that provision be made for the welfare of the person as provided in this chapter.

When no relative, friend or other person can be found in the county who is able and willing to make and file the petition herein provided, any peace officer, probation officer, physician attending the patient, physician attached to a public hospital or institution, if the person is a patient therein, or public guardian may make and file the petition herein provided. The district attorney or his deputy shall prepare the petition and all other forms required in the proceeding when requested by the party who is to file the petition or other form. When a petition is filed by any such person, neither the person making or filing the petition, nor his superiors, nor the department, hospital, or institution to which he is attached, nor any of its employees, shall be rendered liable thereby either civilly or criminally, if there was probable cause for the making and filing of said petition.

Sec. 5050

Orders for examination and safekeeping; Appointment of medical examiners; Notice of examination; Service. Whenever it appears by petition pursuant to this chapter, to the satisfaction of a judge of the Superior Court in any county that any person therein is mentally ill, and in need of supervision, treatment, care or restraint, the judge shall so far as consistent with Sec. 5156 of this Code, make such orders as may be necessary to provide for examination into the state of mental health of the person, and for the safekeeping, necessary medical treatment, care or restraint of the person, pending hearing, in the county psychopathic hospital, in his own home, in a state hospital, or in such other place as will afford access to medical examiners for the purpose of

EXHIBIT "B"

examination and suitable provision for the safety and comfort of the person. THE JUDGE SHALL BY ORDER APPOINT TWO MEDICAL EXAMINERS TO MAKE A PERSONAL EXAMINATION OF THE PERSON AND TO REPORT THEREON TO THE COURT.

If the judge is satisfied that the person is sufficiently mentally ill that examination should be made into the state of his mental health, the judge shall issue an order notifying the person to submit to examination at such time and place as designated by the judge. The order for examination shall be served as provided in Sec. 5050.2, by a peace officer or counselor in mental health of the county at least one day before the time fixed for the examination. The person shall be permitted to remain in his home or other place of domicile pending the examination, and shall be permitted to be accompanied by one or more of his relatives or friends to the place of examination.

If it appears to the judge from a certificate of a licensed physician and surgeon dated not more than 3 days prior to the presentation of the petition and filed with the court, certifying that he has examined the person and is of the opinion the person is mentally ill, and because of his illness is likely to injure himself or others if not immediately hospitalized or detained, or if it otherwise affirmatively appears that said person is likely to injure himself or others, the judge may issue and deliver to a peace officer or counselor in mental health of the county an order directing that the person be forthwith detained in a place designated in the order for examination and hearing as provided in this chapter. The judge may issue a similar order, if the person fails or refuses to appear for examination when notified.

Sec. 5128

Trial as in civil causes; Requirement of three-fourths verdict; Adjudication of mental illness or insanity; Order for detention, etc., in hospital; Delivery of person and copy of order, etc. The trial shall be had as provided by law for the trial of civil causes, and if tried before a jury the person shall be discharged unless a verdict that he is mentally ill is found by at least three-fourths of the jury. If the judge adjudges or the verdict of the jury is that he is mentally ill the judge shall adjudge that fact and make an order similar to the original order for detention in a licensed hospital or sanitarium or for commitment to a state hospital. If such order is for the supervision, treatment,

care or restraint of the mentally ill person in a licensed hospital or sanitarium, a peace officer shall deliver the person and present a copy of the order to the superintendent or other official of such institution; if the order is for the commitment of a mentally ill person to a state hospital, such order shall be presented, at the time of commitment of the mentally ill person, to the superintendent or person in charge of the state hospital to which the mentally ill person is committed.

A QUESTION FOR THE COURT AND FOR REPUBLICANS

It is time that the Belli-Maloney incident came out into the open.

I have repeatedly asked Republican leaders to tell the public about the felony of Edmund Brown, which disqualifies him to be Governor. Apparently, the leaders are afraid to bring this matter to voter-attention because of Republican involvement.

I believe that all citizens understand that there are good and bad Republicans, as well as good and bad Democrats. Also, I believe that the voters, both Republicans and Democrats, have a right to know the true facts about candidates, so that they intelligently place their vote.

The Walker case involves conspiracy for deprivation of civil rights and property and conspiracy against the public interest, forgery, falsification of public records, and document removal by the District Attorney acting in collusion with other interested parties.

At the time Judge Karesh unlawfully denied motion to vacate void court proceedings and orders, he stated in the courtroom that Belli and Maloney had rights.

What rights do Belli and Maloney have? The only answer is that Belli and Maloney have no rights against Walker, but that Walker has rights against them and others too, the assertion of which the Court has delayed.

The parties --

Maloney, a Republican legislator,
later replaced in office by the Brown-Burton machine

Belli and Walker were Young Republican State Directors

Walker is a Republican,
who was a Bank of America employee, employer-involved in NBA violations (requiring charter forfeiture under 12 USC) causing death and economic poverty, who developed a radio program to remedy bad financial practices to prevent economic poverty.

District Attorney Brady was a Republican,
who implemented the conspiracy

District Attorney Brown - present Governor - who committed the forgery and falsification of public records, was a Democrat turncoat, whose '46 Republican campaign was handled by Republican Belli, who is now a Democrat turncoat.

District Attorney Lynch - present Attorney General - was involved in the above felonies also.

District Attorney Ferdon is a Democrat, who is involved in document removal to perpetuate the felonies.

Certain Judges are involved, as shown in the record.

THE MALONEY INCIDENT

It was the closing hour
And the sun was sinking
And the towering buildings
Were casting angled shadows
Through draperied windows
Into darkened offices
Settling into stillness
After the workers out-rush.

An after-hour appointment
Pending with the legislator
Brought a girl to the office
On a proposal of assistance
By the Mayor at City Hall
For a prospected radio program
Designed for public benefit
To solve economic problems.

In the legislator's office
There was danger lurking
For the unsuspecting girl
Who came for the appointment.
The legislator greeted her
And offered her a chair
And then, behind her chair,
He locked the office door.

In sunset's angled shadows
Flitting through the room
The girl waited patiently,
The legislator chatting
From a closet door beyond,
And then, on reappearing,
Holding a bottle in one hand,
He was presenting a sex-pose.

In a shocking of surprise
The girl was standing up
And suddenly was darting
Around the legislator's desk,
Evading the reaching hands
Seeking to persuade her
Yielding to sunset's sexy whims
On a nearby couch of black.

In explanation's aftermath,
A retrieval of composure
Followed upon tumbling words
About a surgeon's operation,
And a girl supporting a mother,
And $25 a month for friendship --
He only wanted a little touch
And some human understanding.

In the incident's aftermath,
On the girl's leave-taking,
Fellow Republican politicos
Effected pre-planned conspiracy
With national bank employers
To keep from public knowledge
The story of banking crimes
And legislator's indiscretion.

In discussion, a banker said
That the legislator stated
That the radio program involved
Was designed for the purpose
Of making men acquaintances,
Which was an untrue statement
Impelling her to seek counsel
With Republican associate Belli.

Concurrently, SEC agent-spies
Unlawfully told bank officials
Of a report made in confidence
Of the bank's NBA violations,
Impelling banker-lobbyist Stevenot
To see her friends and relatives
To defeat her program efforts
And then unlawfully take her job.

THE BELLI INCIDENT

The following excerpts are taken from "The Continuance of the Deprivation of Civil Rights in the Walker Case under color of State Law constitutes Conspiracy under 18 USC 241--371."

...

It is the statutory duty of attorneys,
As defined in legislative specifics
As set out in Sec. 6068 of BP Code --
To support Constitutions and laws,
To maintain only actions legally just,
To abide by the truth in proceedings,
To defend clients against charges made,
And to keep inviolate client-confidence.

...

The attorney's BPC 6068 violation,
Deprived the right to counsel and defense.
We were Young Republican state directors.
The record shows the attorney as witness.
He advised Stockton he served as attorney,
And admitted initiating the proceedings,
After I had consulted him as an attorney
About improprieties of a state politician.

...

It was during U. N. Conference time,
And I was publicist for S. F. Unit, AWVS.
Motion and verified petition were filed,
On due process denial voiding jurisdiction,
And the Court issued order, June 15, 1945,
Annulling, vacating the original record.
When the attorney advised it was cancelled,
I was surprised but he promised rehearing.

Behind my back and without my knowledge,
A stipulation was filed 11 days later,
And made into court order, June 25, 1945,
Setting aside the order of June 14, 1945,
Prepared on D. A. Edmund Brown's paper,
Signed in the handwriting of a deputy,
Who signed the name of my attorney's firm,
Unauthorized either by me or by the law.

Petition-denial on September 12, 1945,
Resulted in Grand Jury hearing in October,
The D. A. being ordered to clear records.
The D. A. then made an alternative proposal.
He said he would ruin me with litigation,
Unless I released the involved parties,
But, if I did, he would expunge the records
And support a $10,000 claim bill for me.

Prudence seemed to demand my acceptance,
As D. A. support could win the claim bill
And this amount would reestablish me,
And I could then go on to other things.
I signed the release on January 30, 1946,
And the attorney and D. A. the stipulation,
And Court Order issued on February 1, 1946,
Setting aside and expunging the record.

In a matter of days, I was upset to see
Items in Herb Caen's Chronicle column
That the District Attorney, Edmund Brown
And Melvin Belli, railroading attorney,
Were closely involved as personal friends.
March 2nd -- Belli reversing decisions,
March 15th -- Announcing Belli handling
The Republican D. A. Pat Brown campaign.

...

At once, I began work on the claim bill,
Being told the release would prevent it.
The D. A.'s office on January 11, 1947,
Gave me a letter stating that the release
Did not include the State of California,
Thus clearing the way for introduction,
And pendency of the bill was announced
In Herb Caen's column January 28, 1947.

...

In San Francisco, I engaged an attorney,
Not knowing he was in the enemy's camp,
A wife's cousin of claim-opposing attorney,
A friend of 'forged-stipulation' deputy,
A recipient of case referrals of D. A.
And $30,000 case from politician involved,
His firm opposing my mother-support case --
Whih barred him from being my attorney.

After hearings held in the legislature,
With WI Code stiffened for protection,
And $2,500 suggested for $10,000 promised,
Amended claim was filed on July 2, 1948,
Under direction of the involved politician,
Which was cut to $2,000 on August 18, 1948,
And, on attorney's failure to attend hearing,
Was cut to Bank-of-America-salary, $1,440.

...

I found the release CC 1668 unlawful,
It being against the policy of the law
For parties seeking to avoid liability
For acts of fraud and wilful injury
To demand release from parties injured.
But I was unprepared for demand-denial
For illness notice and bank refusal,
By attorney, State Bar, Supreme Court.

...

In order to qualify for federal injunction,
I prosecuted an action in Superior Court,
And therein discovered on May 5, 1964,
Forged-stipulation-order of June 25, 1945,
And expungement unrecorded, on May 10, 1964,
Showing record-validity of unlawful order
Set aside by final order of June 14, 1945,
Voided by D. A.'s forgery on June 25, 1945.

...

The problem now, Superior Court admission
And CCP 1916 voidance for non-jurisdiction
Of original December 20, 1939, proceedings,
Implementing the June 14, 1945, order,
Annulling December 20, 1939, proceedings,
Which under CCP 963 became a final order --
The June 25, 1945, D. A.-Court 'forgery',
Being subject to PC 799 felony prosecution.

Dated: San Francisco, California, August 14, 1966.

CLAUDIA WALKER

This will be forwarded to all Republican Committee sources, certain Congressional sources, certain Judicial sources, and to named parties, and will be filed as a Court-document-exhibit.

CLAUDIA WALKER

CHRONOLOGY OF EMPLOYMENT

October 1928--January 23, 1940
Bank of America National Trust & Savings Association

Letter of recommendation from former President Will F. Morrish dated March 7, 1950:

"Miss Walker's record during the period I knew her was much above the average. She was a fast and efficient worker and her handling of the public was exceptionally good."

Re: low salaries

The bank hired out its employees, without their knowledge or consent, to its own corporations, organized to violate provisions of the National Bank Act, under the name of Transamerica Corporation, collecting two and three times the amount of salary paid.

1928
Accounting Department
Stenographer
$90 per month

1929-1931
Bank Properties Department
Handling bank premises and foreclosed properties
Stenographer
Registered with American Institute of Banking
Salary deductions for employee stock purchases
$90 per month

Capital Company
Acquired and operated bank-owned city properties
Clerk in charge of rent records for California
Supervised two stenographers and one bookkeeper
$125 per month
Separated due to depression cutbacks

EXHIBIT "D"

1931

Bank Branches

Traveling relief teller, stenographer

Hourly rate, plus expenses

1933

California Joint Stock Land Bank

Liquidating farm loans, recalling bonds

Secretary

$110 per month

October

5-year pin, Bank of America N. T. & S. A.

1935

Bankamerica Agricultural Credit Corporation

Livestock loans, rediscount financing, 5 states

Secretary, Advertising copywriter, Clerk

$115 per month

1937

October

10-year pin, Bank of America N. T. & S. A.

1939

July

Securities & Exchange Commission Investigation

San Francisco Chronicle:

"TAC may sue to keep loans secret."

August

September

All employees wanted investigation

I informed SEC of National Bank Act violations

SEC attorneys, bribed to report information, gave information unlawfully to bank officials

October 23

Resigned under unlawful pressure by Stevenot

Separation with salary to January 23, 1940

SEE: 1961-1965 BANK OF AMERICA LEGAL PROBLEM

NATIONAL BANK ACT VIOLATIONS REPORTED:

Accounting Department

Transmitted funds, withheld from local loan use, to Call Money Market, New York, at 20% interest.

Refused to pay for demanded overtime work.

Capital Company

Organized to violate law requiring banks to sell foreclosed properties in 5 years.

Bought in at bid-price, letting bank take deficiency judgments.

Speculatively operated and sold properties.

At sale, retained mineral rights for bank.

Refused to pay for demanded overtime work.

California Lands, Inc.

Organized to handle country properties in the same manner as Capital Company.

California Joint Stock Land Bank

Arranged with Blyth & Co., Stockbrokers, to send fraudulent letter to interstate bondholders, calling in bonds, actually worth 100%, for 60%; refused to give true facts on demand of bondholders.

Speculated with profits in U. S. Treasury Bond Market.

Used profits to operate Bankamerica Agricultural Credit Corporation and give bonuses to favored officials.

Transferred liquidating loans to Federal Land Bank of Berkeley, retaining Federal-regulation-prohibited second mortgages, unrecorded.

Collected second mortgages from transferred borrowers; several borrowers secured court relief in the U. S. District Court at San Francisco.

Refused to pay for demanded overtime work.

Bankamerica Agricultural Credit Corporation

- Conducted unlawful interstate bank loan business.
- Rediscounted loans at Federal Intermediate Credit Bank of Berkeley, paying 3% interest, on total funds of interstate loans.
- Loaned funds to interstate borrowers on monthly budget basis, leaving substantial bank retentions for given periods.
- Speculated with loan retentions in Transamerica Stock in individual names, such as C. P. Cuneo, brother-in-law of A. P. Giannini, $90,000.
- Death of Ed Wood, livestock appraiser employee; transferred to him unlawful 100% land loan to Al Kuhn, on a $20,000 advance of his father-in-law; made him a 100% loan on sheep which after purchase commenced to die off.
- Panicked bank officials pressured Wood, who panicked and attempted a holdup of a bank official at American Trust Company and was put in jail.
- Frightened officials, fearing results of Wood's testimony, were joyously relieved, when he was dead next morning with a belt strap around his neck and with a handkerchief stuffed down into his throat, because there would be no testimony.
- Officials took over the Wood spread without question, in a situation where it was reported that the land was the cause of the deaths of the sheep.
- Account cards changed to cover-up unlawful loans.
- Refused to pay for demanded overtime work.

Title 12, Section 93, USC, provides for forfeiting of the bank charter for violations of the National Bank Act, and cancellation of all rights and privileges under the Act.

The Comptroller of the Currency, answerable only to the President who has an Assistant who is affiliated with the bank, will not enforce the law; and Congressional Banking Committees will not investigate; both of which assure that the law is ineffective.

1929
April
Character (Five petals of pink wild rose)
Prize talk, Giannini Contest
Published in Centerville newspaper

1934
Wrote a novel about banking -- principal character, John Wayne, ruined by banking law violations, accused of murder of banker of which he was innocent
Not published

1935-1939
Organized Civil Service Employees Widows Association, after father's death, when Federal Civil Service Retirement Pension ceased, to gather data from widows to present to Congress for pension legislation for widows
Congress approved pensions for Panama Canal Zone widows and later for future widows, but ignored older widows

1936-1938
Instituted radio program on KYA to feature prominent San Franciscans on American theme
Daughters of American Revolution
Admitted to Membership April 18, 1936
Nat'l Number 294921 (Lt. Alexander Walker)
Elected Chairman, Tamalpais Chapter
Press Relations and Radio
Resigned June 21, 1938
Discontinued program for unwarranted interference by San Francisco Chairman

1937-1939
Young Republicans of California
Member, State Board of Directors

1938-1939
Developed radio program idea to feature economic problems and remedies to eliminate poverty
Took voide lessons
Active interference by Bank of America officials, who did not want banking evils exposed, prevented development

ENDORSED
FILED
AUG 19 1966
MARTIN MONGAN, CLERK
By J. A. Ortelle
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

In re Claudia Walker) NO. 18,160
ORDER (CCP 1953.02)

The Petition of Claudia Walker for an order substituting certified copy of the Order of Court in the above matter, filed February 1, 1946, having come on regularly for hearing this 19th day of August, 1966, upon notice duly and regularly given, Claudia Walker appearing in person, District Attorney John Jay Ferdon appearing by E.W.JEAN WRIGHT, and good cause appearing therefor:
J.

The Court finds that the said order was made and entered and filed on February 1, 1946; that a certified copy of same was issued by the County Clerk on June 10, 1960; that said order has unauthorizedly been removed from the file; that Claudia Walker is entitled to have it replaced in the file by means of this order.

IT IS HEREBY ORDERED that a copy of the aforesaid certified order be attached to this order and said copy shall hereafter have the same effect in all respects as the original would have had, and particularly to support the record now before the U. S. Court of Appeals, No. 21147, in which said Order was certified by the County Clerk to the District Court of Appeal 1 Civ. 23371 on January 3, 1966 at page 27 of the Judgment Roll.

Dated: August 19, 1966.

CURTISS E. WETTER
JUDGE OF THE SUPERIOR COURT
OFFICE DEPT. X-2

Note by Walker: Attached to said Order was a copy of the certified copy of the February 1, 1946 order as appears at Judgment Roll, page 27.

EXHIBIT "E"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

HONORABLE JOSEPH KARESH, JUDGE, DEPARTMENT No. 16

In re)
) No. 18160
Claudia Walker)

REPORTER'S TRANSCRIPT
DECEMBER 17, 1964 - 10:30 A. M.
JANUARY 14, 1965 - 10:30 A. M.

APPEARANCES:
In propria persona: CLAUDIA WALKER

THE CLERK: Walker v. Superior Court.

THE COURT: Miss Walker, ---

MISS WALKER: Yes, the title is wrong, your Honor. It should be, I think, In re Claudia Walker. I mean, there were other words, but I left them out.

THE COURT: What is the matter before the Court?

MISS WALKER: This is a matter to vacate, annul and set aside an order. It was properly noticed. I filed a memorandum; I filed an affidavit.

THE COURT: To annul what order?

MISS WALKER: Of December 20th, 1939, in which---

THE COURT: The Court can not enter such an order. The Court has no power to enter such an order.

MISS WALKER: The Court had no jurisdiction at the time it made the order and I am ---

THE COURT: There was a hearing.

MISS WALKER: There was no hearing, your Honor. You haven't read the papers if you say that.

THE COURT: I have read the papers.

MISS WALKER: There was no hearing at all, your Honor.

EXHIBIT "F"

THE COURT: What you consider is no hearing is still a hearing. You may be dissatisfied with it, but---

MISS WALKER: It is not in accordance with the Code. I have set this out. There was no determination by the medical examiners--of those medical examiners. One of them is disqualified. RT2

THE COURT: Then the medical examiners made a finding.

MISS WALKER: Can we have a detailed argument based on my memorandum at this time? Is it convenient?

THE COURT: To the Court it is obvious. I am sorry that you are in this situation, but the Court is without power to grant you the relief for which you pray.

MISS WALKER: All right. Mr. Edmund Brown committed forgery. He forged my attorney's name on June the 25th, 1946. I have just discovered this forgery. The forgery is the last record that has been recorded. It leaves me in a situation where the December 20th, 1939, order is extent. I am personally, by virtue of the fact there is no other recorded record, apparently, under the jurisdiction of this Court, which I certainly can not stand for, and all of my property rights have been taken.

THE COURT: I can not set aside the finding of the Court. I will make a concession that there are many ---

MISS WALKER: I was denied due process of law that is guaranteed by the United States Constitution.

THE COURT: There are many procedures insofar as the commitment of the alleged mentally ill that should be changed.

MISS WALKER: C. C. P. 1916 allows me to raise the question of jurisdiction. You realize this means an appeal.

THE COURT: Yes, I do. RT3

MISS WALKER: Can't we have a full argument, your Honor?

THE COURT: There is no argument necessary, Miss Walker, because I am convinced that this Court is without power to grant you the relief for which you prayed.

MISS WALKER: You have power to correct the error that has been committed.

THE COURT: The judge found you mentally ill.

MISS WALKER: The judge was an incompetent old man. One of the medical examiners was an alcoholic. I have proof of this. It is in the San Francisco Coroner's records.

THE COURT: That would still not permit us---

MISS WALKER: The medical certificate was not completed. I came into court in '45, your Honor. I spent very good money with Gladstein, Andersen & Resner. They stole my money, lied to me. Mr. Edmund Brown put a forged stipulation in this court record, and I have shown it to you. I subpoenaed Mr. Brown here today and he is not here. I don't know whether the sheriff served him or not.

THE COURT: The governor?

MISS Walker: Mr. Edmund Brown, the attorney. He was the district attorney at the time, and he personally signed one of those papers. Not the forgery, but his office signed the forgery, but he knew about it.

THE COURT: Well, Miss Walker, ---

MISS WALKER: Why are you denying me relief? Under RT4 what provision of the law?

THE COURT: Under the provision of the law that you can not set aside this judgment.

MISS WALKER: Under what provision of the law?

THE COURT: I can not set aside this finding of mental illness, the judgment.

MISS WALKER: The judge was a liar. He had no right to do it. He was an incompetent old man. I had no trial.

THE COURT: I can not substitute my judgment for his.

MISS WALKER: I had no trial.

THE COURT: You had a right of trial by jury, didn't you?

MISS WALKER: I have had no trial. You haven't read the papers, your Honor.

THE COURT: You had a right of trial by jury.

MISS WALKER: I demanded it, but I didn't get it. Would you release this so I can go into the federal court?

THE COURT: Release what?

MISS WALKER: I have tried to go into the federal court and your people here have come in and -- I mean this: Your people, your Honor, not you personally, Mr. Brasil representing this Court has gone over to the Federal court and objected. I don't want it heard in this court, frankly. Every time I come in here you say no, and there is no reason/ for saying no today. RT5

THE COURT: I can not set aside the judgment finding you mentally ill.

MISS WALKER: Why? Why?

THE COURT: I have no power to do it.

MISS WALKER: I was never mentally ill. I never had a trial. I brought this up. I spent hundreds and hundreds ---

THE COURT: There were two medical examiners appointed.

MISS WALKER: One of them was a drunk and he died a drunk. This is in the coroner's report.

THE COURT: That would be no grounds to set aside the judgment of---

MISS WALKER: There was no determination. They didn't even complete the certificate of the medical examiners. Your Honor, I do think if you would give time for a complete argument---

THE COURT: A complete argument can not help. I do not have the power to do it.

MISS WALKER: I claim the Court had no jurisdiction. The Court had no jurisdiction either to---

THE COURT: The Court acted upon the recommendation of the medical examiners, two of them, and the judge, whom you complained against, found you mentally ill, and there is nothing that this Court can do.

MISS WALKER: I was denied due process of law and I RT6 presented my cases.
May we argue along the lines of the memorandum?

THE COURT: No, Miss Walker. And may I say that that declaration that you filed in this court attacking a lawyer---

MISS WALKER: Mr. Belli is a criminal. He should be disbarred, sir. He should be disbarred.

THE COURT: --and attacking some other public official-- I will not mention his name.

MISS WALKER: All right. He should have been thrown out of office.

THE COURT: I on my own motion am going to strike this document as scurrilous and order that the complaint which you entitled, "Demand upon the American Bar Association to Disbar Melvin Belli"---

MISS WALKER: Demand upon the American Bar Association to Disbar Melvin Belli for Unethical Practices.

THE COURT: That hasn't anything to do with these proceedings. You have attacked a person who served his state and the legislature well for many, many years.

MISS WALKER: He did not serve his state well.

THE COURT: I strike it from the record. It is impounded and it will not subject -- if these remarks were made outside, they would be slander.

MISS WALKER: They are not slander, your Honor. They happen to be true.

THE COURT: --slanderous and libelous. Obviously it RT7 has nothing to do with these proceedings.

MISS WALKER: You are denying to me my civil rights as an American citizen under that flag.

THE COURT: I am not denying your rights as a citizen.

MISS WALKER: Under what statute do you refuse to hear this?

THE COURT: You speak of your rights.

MISS WALKER: My rights as an American citizen.

THE COURT: These other people have rights not to be---

MISS WALKER: They have no right to do anything like that to me.

THE COURT: --not to be slandered in the manner that you slandered them.

MISS WALKER: They can sue me if I slander them.

THE COURT: You filed it in a court proceeding. In any event, I deny your motion. You now have your remedy on appeal. If this is constitutional, and you say that the federal court cantake jurisdiction, it is up to the federal court. I say that I have no power to do it and I can not say any more. I am not going to spell out in detail why I don't have the power. I simply ---

MISS WALKER: May I know why you don't have the power? I want to know this.

THE COURT: I deny the motion, Miss Walker.

MISS WALKER: But why, your Honor? RT8

THE COURT: I am sorry that there was a finding of mental illness, but there is nothing---

MISS WALKER: There was no mental illness. The judge was a liar and he was an incompetent old man.

THE COURT: I can not substitute my judgment for his.

MISS WALKER: I am entitled to show that I was denied due process of law. I am entitled to show that the Welfare and Institutions Code was not complied with, which is true.

THE COURT: On the state ofthis record, you were not denied due process of law--

MISS WALKER: I was denied.

THE COURT: So that this Court could -- could set aside that finding.

MISS WALKER: I was denied. The record showed that I had no attorney; that he (CORRECTION: I) requested Mr. Belli and Mr. Belli appeared as a witness. This is in the handwriting of Dr. Reilly.

THE COURT: Well, Miss Walker, I am very sorry there was this finding, but there is just nothing I can do about it. I can not do it.

MISS WALKER: I am asking you to set aside a void order, an illegal order.

THE COURT: I have no such power.

MISS WALKER: And you are giving me no citation as to any reason why?

THE COURT: I give you no citation. I am very/ RT9
familiar with these proceedings because I happen to sit out at psychiatric court and---

MISS WALKER: You are violating the law probably doing that.

THE COURT: I doubt it.

MISS WALKER: These people have a -- well, you don't believe in the American Constitution.

THE COURT: Yes, I believe in the American Constitution.

MISS WALKER: You can't or you wouldn't do it. Well, I will try to go into the federal court. Will there be any more opposition by this Court?

THE COURT: I don't have anything to say about it. I have denied your motion.

MISS WALKER: I don't want to be heard in this court. I don't want anything to do with this Court.

THE COURT: All right.

MISS WALKER: I am talking about the whole Superior Court.

THE COURT: All right.

MISS WALKER: I don't want them appearing in federal court denying me a hearing there, because I am an American citizen and I am entitled to be heard. And this has never been heard, your Honor. This is the trouble. You won't go into it -- I mean, your court won't go into it.

THE COURT: You mean no judge of our Superior Court? RT10

MISS WALKER: Nobody in the court will go into it. There was never a trial; it was a railroading. It was a crime.

THE COURT: I am sorry it happened to you because-- but there is nothing I can do about it.

MISS WALKER: Well, Melvin Belli, I am not going to let him get away with it. I am not --

THE COURT: Protest to the American Bar. That is your responsibility. But the remarks that you made in this proceeding against him and against others, the things you said---

MISS WALKER: The remarks are true.

THE COURT: -- are not justified and you shouldn't do it.

MISS WALKER: Look what they said about me.

THE COURT: I am sorry, Miss Walker. You are not going to accomplish anything by using the type of language against these people that you did. I do not think you will accomplish a thing.

MISS WALKER: I intend to have this off in spite of you and everybody else.

THE COURT: If you should prevail, I assure you that this Court will not feel offended, if you should prevail. I simply said I do not have the power. All right.

MISS WALKER: Under what statute? You haven't tole me.

THE COURT: Under the law.

MISS WALKER: What law? RT11

THE COURT: Under the law.

All right. Call the next cases, Mr. McGuire.

MISS WALKER: I will appeal.

THE COURT: All right. That is your privilege.

--- RT12

JANUARY 14, 1965 -- 10:30 A. M.

THE COURT: Call th case, Mr. McGuire.

THE CLERK: In re Walker.

THE COURT: Miss Walker, you designate the proceeding as a motion for a new trial. It isn't a motion for a new trial. You have asked me to set aside a finding of mental illness that occurred way back in the '40's. I have indicated before that I have no jurisdiction to do so.

MISS WALKER: Your Honor, I have a final order that was issued on January (CORRECTION: June) 14-15, 1945, based on a collateral attack which was validly made. The order was recorded. Edmund Brown committed a forgery and set it aside by that means, and it could not be attacked unless it was attacked by a motion for a new trial or a motion to vacate, neither of which was done. The order became final. The order of June 14-15 set aside the December 20, 1939, judgment and it became a final order on August 15, 1945. And I have a document here which is a check from the State of California, and it reads, "In full settlement of claim for damages arising out of alleged erroneous commitment to Stockton State Hospital," and this was following three years of investigation by the California State Legislature.

Now, your Honor, my life is being ruined by this. I might as well commit suicide as let this matter continue any longer. Your Honor, the expungement (OMISSION: order) that I tried to make/ is (ERROR: omit is) good and I RT13
tried to do this in all good faith without any chicanery on my part at all, as has been shown in the public records here---

THE COURT: You have made some ---

MISS WALKER: With a copy of Edmund Brown's forgery.

THE COURT: You have made some rather terrible accusations against some people.

MISS WALKER: This is a very terrible thing to do, your Honor.

THE COURT: But, at any event, --

MISS WALKER: I had a final order and I am entitled to the benefit of this order of June --

THE COURT: Miss Walker, I have tried, and I wish there was some way in which any person who assumed that there had been a valid commitment, and we must assume from the record in this case a finding of illness---

MISS WALKER: You can't assume it, not based on the record.

THE COURT: Pardon me, Miss Walker. I wish it were possible that we were to assume in some other case where a person has been confined to a state hospital on a court commitment and has been restored, that you could completely expunge the record. I wish it were humanly possible.

You are not the only one in situations such as this. We have people who have been committed for a week or two and still have the --- RT14

MISS WALKER: Your Honor, your Honor, it was an unlawful commitment. It was no hearing. I was strapped to the mattress on the floor while Melvin Belli sat there and watched and lied about me. He had no witness (ERROR: right) to say anything. He was supposed to be my attorney. This is railroading. This is against the law. The law was violated. I came in -- the State Board at Sacramento was in a position of having been cheated, because I had no right to $1440 on a phony record. They gave me the evidence to go into court and to get this cleared off. I paid Andersen over $550 to get this matter cleared off. We got a valid judgment.

THE COURT: You write a letter to a court and you say, "If you do not decide my way, I am going to do this and this," and I wish to tell you that that amounts to an obstruction of justice.

MISS WALKER: I don't---

THE COURT: You can not threaten a judge in that way by saying, "If you do not do the way I tell you, I will threaten you with this."

Now, you have no right to do that.

Now, as far as I am personally concerned, it does not bother me at all, but you can not do that to a court.

MISS WALKER: Your Honor, I have a final order of June 14-15, 1945, that was recorded and no court could set aside that order the way it was set aside.

THE COURT: Well, it has been set aside as you suggest./ I have told you, Miss Walker, -- You seem to RT15
think---

MISS WALKER: It can't be set aside in that way.

THE COURT: You seem to think that I am callous to your problem. I am not.

MISS WALKER: The judgment was set aside, your Honor.

THE COURT: I sit in the psychiatric department of the Superior Court and I see the problems. I am well aware of the problems --

MISS WALKER: Your Honor, ---

THE COURT: --but there is nothing, Miss Walker, that I can do.

MISS WALKER: This judgment of December 20th, 1939, was set aside by an order of this court on June 14-15, 1945. That order became final. That order set aside the other judgment and I am entitled to the benefit of that order.

THE COURT: If you say it did, what do you want this Court to do?

MISS WALKER: Well, I have it right here---

THE COURT: What do you want me to do?

MISS WALKER: I want you to vacate Edmund Brown's forgery of June 25, 1945.

THE COURT: I will not characterize it as a forgery---

MISS WALKER: I have it here, your Honor. RT16

THE COURT: Miss Walker, I can not do that.

MISS WALKER: You can under Section (OMISSION: CCP 1916) and I have given you the citations.

THE COURT: Well, ---

MISS WALKER: The Court had no jurisdiction to act against a final order except on the motion system. No statutory proceeding was filed. It could not be set aside by stipulation.

THE COURT: If the court had no jurisdiction to act, you should have taken your appellate procedures at that time.

MISS WALKER: Your Honor, I don't have to. The proceedings are void. I have presented you---

THE COURT: If they are void, I don't have to do anything.

MISS WALKER: Yes, you do. I have a right to ask you to declare the June 25, 1945, (OMISSION: order) to be void, all subsequent proceedings to be void, the February 1st order to be void, leaving the June 25th (ERROR) 14-15, '45 order fully effective.

THE COURT: I do not have the jurisdiction--

MISS WALKER: Yes, you do, your Honor.

THE COURT: --so to do. And now, Miss Walker, all I am saying to you is, if you wish to take any action, you take appropriate action.

MISS WALKER: This means that I have--

THE COURT: Just a moment, Miss Walker. It is a violation of the law to threaten people through the mails. Now, I want to tell you that. And you have been doing things like that. You write threats through the mails and-- RT17

MISS WALKER: Your Honor,---

THE COURT: Pardon me, ma'am. Now I can take care of myself personally; I think I can. I do not like threats through the mails---

MISS WALKER: Your Honor, ---

THE COURT: And I would also say, through the mails, that you are violating the law because you are making certain types of statements through the mails. It is a violation of the law.

Now, I am not going to say any more. I have told you that I feel deep sympathy for people who have been involved in mental illness procedures.

MISS WALKER: I don't want sympathy. I was railroaded and deprived of my rights, your Honor, and I am entitled to the benefit of the June 14-15, '45 order, which became final.

THE COURT: I deny your motion which you characterize as a motion for a new trial. You have your appellate procedures; you may do what you believe is proper. But I will tell you, you should stop threatening people.

MISS WALKER: It is not a matter of threats, your Honor. It is a matter of getting my rights as a citizen of this country-- RT18

THE COURT: Miss Walker, Miss Walker, you get your rights through lawful channels. I have told you this Court does not have the power to grant you relief, assuming what you say is true, and I do not accept it as true. I can not. But even if it were, I do not have the power to do what you ask the Court to do.

MISS WALKER: The June 14-15, '45, order became final. Did you deny this?

THE COURT: I make no more--The motion as you characterize it for a new trial is denied, and when I say I have sympathy for you, that you do not accept --

MISS WALKER: I don't want sympathy, your Honor.

THE COURT: -- I do not in any way want that statement to mean that I believe your statement against the new Governor is correct.

MISS WALKER: The Governor committed a forgery and I have the proof.

THE COURT: I do not believe that the Governor committed a forgery, but that is all right.

MISS WALKER: I shall most certainly appeal.

THE COURT: That is your privilege, Miss Walker, and if the appellate court reverses this Court, I take no pride of authorship; I still have sympathy, even though you do not want it.

MISS WALKER: I don't want your sympathy. I want justice and I am going--and I am not getting it. RT19

THE COURT: All right, Miss Walker. RT20

(Title of the Court and Cause - #18160)

STATE OF CALIFORNIA)
CITY AND COUNTY OF SAN FRANCISCO) ss.

I, JOSEPH H. ALENT, do hereby certify that I am now and at all times herein mentioned, was the duly certified, appointed and acting shorthand reporter of said department of said court; and that as such reporter I attended the trial of the above-entitled cause and took down the said trial in shorthand; that the foregoing is a full, true and correct transcript of my shorthand notes so made of pages 1 through 30 thereof.

Dated: October 6, 1966. /s/ J.H.ALENT JR

(Note by Walker: Noted errors-omissions-corrections by Walker)

NO. 21153

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

See Vol. 3384

LOUIS SANDERS, et al.,

Appellants,

vs.

JOHN ERRECA, et al.,

Appellees.

PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FADEM AND KANNER
By: GIDEON KANNER

6505 Wilshire Boulevard
Los Angeles, California 90048

Attorneys for Appellants

NO. 21153

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOUIS SANDERS, et al.,

Appellants,

vs.

JOHN ERRECA, et al.,

Appellees.

PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FADEM AND KANNER
By: GIDEON KANNER

6505 Wilshire Boulevard
Los Angeles, California 90048

Attorneys for Appellants

TOPICAL INDEX

TABLE OF AUTHORITIES

Constitution

Statutes

Rules

Texts

NO. 21153

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOUIS SANDERS, et al.,

Appellants,

vs.

JOHN ERRECA, et al.,

Appellees.

PETITION FOR REHEARING

Appellants respectfully petition this Honorable Court for a rehearing.

The grounds of this Petition are briefly stated below, and supported by authorities elsewhere in this Petition. The grounds are:

(a) That by not being afforded an opportunity to be heard by any court on jurisdiction - the sole issue which this Court sua sponte deems controlling - Appellants have been deprived of their day in Court and of due process of law.

(b) That federal courts have jurisdiction herein both under 28 U.S.C. §1331 and 28 U.S.C. §1343 as to both a deprivation of property rights protected by the Constitution and by 42 U.S.C. §1983.

(c) That if a question as to jurisdiction arises after the case has been briefed and argued, the case should be remanded to the District Court for a determination of jurisdiction or, in the alternative, the parties should be given an opportunity to be heard re jurisdiction.

(d) That a deprivation of a constitutionally protected right can, and in the case at bench has occurred, without physical seizure of Appellants' property.

Inasmuch as the Court's Opinion herein cites no authority, and since Appellants respectfully submit that such opinion is a clear departure from the holdings in many cases of the U.S. Court of Appeals for the Ninth Circuit (cited in the briefs and in this Petition), Appellants respectfully suggest, pursuant to Rule 23, that this case be reheard en banc.

INTRODUCTION

Inasmuch as the Court has sua sponte based its decision upon lack of federal jurisdiction - an issue which was never raised or mentioned at any stage of these proceedings - Appellants have been deprived of their day in court. Due process requires an opportunity to present one's contentions to the adjudicating tribunal. Londoner v. Denver (1908), 210 U.S. 373 at 386, 52 L.Ed. 1103, 1112; L.B. Wilson v. F.C.C. (1948, D.C.), 170 F.2d 793, 802.

Appellants also respectfully wish to call to the Court's attention two inaccuracies contained in the Opinion. The first is the recitation that Appellants rely on 42 U.S.C. §1983. Actually, Appellants' first ground of reliance is 28 U.S.C. §1331 (see Amended Complaint, Paragraph 1).

Second, the Court's attention is respectfully invited to Paragraph 9 of the Amended Complaint wherein Appellants do claim a taking and deprivation of various property rights (cf., p. 6 of the Court's Opinion).

THERE SHOULD BE AN OPPORTUNITY TO ADDRESS THE COURT RE JURISDICTION

Where the question of jurisdiction has not been presented to the Court by the parties, the Judgment of the District Court should be vacated and the case remanded to it for consideration of the question of jurisdiction. Walker v. Selmont Oil Corporation (1957, 6th Cir.), 240 F. 2d 912 at 916; Dupes v. Johnson (1965, 6th Cir.), 353 F. 2d 103 at 105; Fuller v. Volk (1965, 3rd Cir.), 351 F. 2d 323 at 330. For an alternative procedure for dealing with the issue of jurisdiction raised sua sponte by an Appellate Court, see Brown Shoe Co. v. U.S. (1962), 370 U.S. 294 at 305.

INTERFERENCE WITH USE OF ONE'S PROPERTY UNDER COLOR OF EMINENT DOMAIN IS ACTIONABLE IN FEDERAL COURTS

There need not be a physical appropriation to constitute a "taking" within the meaning of the 5th and 14th Amendments to the U.S. Constitution. Foster v. Detroit (1966), 255 F. Supp. 655. The Court's attention is invited, in particular, to pp. 661-664 of Foster citing and discussing numerous cases. (The stringent limitations of Rule 23 prevent Appellants from discussing such cases in this Petition. We, therefore, respectfully ask the Court to refer to Foster, supra.)

Bad faith initiation of state eminent domain proceedings resulting in economic injury gives rise to a federal cause of action under 28 U.S.C. §1331, Foster v. Herley (1964, 6th Cir.), 330 F. 2d 87. Please note the factual similarity between Foster and the case at bench.

Complaints of abuse of the State's power of eminent domain properly invoke federal jurisdiction under 28 U.S.C. §1331 and the

Civil Rights Act. Cuyahoga Power Company v. Akron (1916), 240 U.S. 462; Mosher v. Phoenix (1932), 287 U.S. 29; Norwood v. Baker (1898), 172 U.S. 269; Dalche v. Levee Commissioners (1930), 46 F.2d 340, 342; Gilmore v. Sandersville R. Co. (1955), 149 F.Supp. 725, 729; Sherwood v. Bradford (1965), 246 F.Supp. 550 (appeal dismissed).

> "Irrespective of diversity of citizenship, if an owner of property is deprived of his property 1/ under color of the state's power of eminent domain but without statutory or other legal authorization in violation of his rights under the federal constitution, he may institute action in the first instance in the in the federal district court." Nichols on Eminent Domain (Rev. 3rd Ed.), Vol. 6, p. 576. Also see Nichols, Id., Vol. 6, p. 575.

Interference with property rights by state officials gives rise to a right of action properly within federal jurisdiction under 28 U.S.C. §1331, irrespective of diversity of citizenship. Lowe v. Manhattan Beach City School Dist. (1955, 9th Cir.), 222 F.2d 258; Miller v. County of Los Angeles (1965, 9th Cir.), 341 F.2d 964; Hix v. City of Los Angeles (1957, 9th Cir.), 240 F.2d 495, 497; McGuire v. Sadler (1964, 5th Cir.), 337 F.2d 902, 905; McKoy v. Schonwald (1965, 10th Cir.), 341 F.2d 737, 739. Also see Harvey v. Sadler (1964), 331 F.2d 387.

1/ "The modern and prevailing view is that any substantial interference with private property which destroys or lessens its value, or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed, is, in fact and in law, a 'taking' in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed." Nichols on Eminent Domain, Vol. 2, p. 407.

CONSTITUTIONAL RIGHTS ARE IMPAIRED BY UNLAWFUL THREATS OF LITIGATION BY STATE OFFICIALS.

Unlawful threats by government officials to institute legal proceedings constitute an interference with constitutional rights. Dombrowski v. Pfister (1965), 380 U.S. 479; Bantam Books v. Sullivan (1963), 372 U.S. 58 (particularly see Footnote 8, 372 U.S. at 67); American Mercury Inc. v. Chase (1926), 13 F. 2d 224; Connor v. Board of Commissioners, etc. (1926), 12 F. 2d 789, 791.

CONCLUSION

Appellants hope that the Court will consider as appropriate herein an expression of Appellants' profound dismay and anguish at having had to experience the expenditure of time and money, to say nothing of the emotional burdens of a hard-fought litigation in the District Court and the Court of Appeals, without ever having had an opportunity to be heard on the sole issue which the Court deems controlling.

Appellants respectfully pray that this Honorable Court grant them a rehearing so that they may be afforded somewhere in this litigation a meaningful opportunity to be heard.

Respectfully submitted,

FADEM AND KANNER

By: GIDEON KANNER

Attorneys for Appellants.

CERTIFICATE

I certify that in my judgment the foregoing Petition for Rehearing is well founded and is not interposed for purposes of delay.

I further certify that, in connection with the preparation of said Petition, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the said foregoing Petition is in full compliance with those rules.

/s/ Gideon Kanner

GIDEON KANNER

No. 21162

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OSVALDO LUGO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.
United States Attorney,
MOBLEY M. MILAM,
Chief Assistant U.S. Attorney
PHILLIP W. JOHNSON,
Assistant U.S. Attorney,

325 West "F" Street,
San Diego, California 92101,

Attorneys for Appellee,
United States of America.

No. [illegible]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OSVALDO [illegible],

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

[illegible] L. [illegible], JR.,
United States Attorney,
[illegible] M. MIHAN,
Chief Assistant U.S. Attorney,
[illegible] M. JOHNSON,
Assistant U.S. Attorney,

[illegible] West "F" Street,
San Diego, California 92101,

Attorneys for Appellee,
United States of America.

Table of Contents

Portman v. American Home

No. 21162

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OSVALDO LUGO, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	)

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, Southern Division, adjudging appellant to be guilty as charged in three counts of a four-count indictment following trial by jury (C.T. 2-7).[1]

The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

---

[1] "C.T." refers to the Clerk's Transcript of Record.

II

STATEMENT OF THE CASE

Appellant and Jose De La Rosa-Wuancho were charged in all counts of a four-count indictment returned by the Federal Grand Jury for the Southern District of California.

Count one charged that appellant Lugo, De La Rosa-Wuancho, and other persons unknown to the Grand Jury agreed, confederated, and conspired to commit the offense of knowingly concealing and facilitating the transportation and concealment of heroin which had been imported and brought into the United States contrary to law, in violation of Title 21, United States Code, Section 173. One overt was specifically described (C.T. 2-3).

Count Two charged that De La Rosa-Wuancho (hereinafter referred to as "De La Rosa") imported and brought approximately two ounces of heroin into the United States, and that appellant knowingly aided, abetted, counseled, induced, and procured the commission of that offense (C.T. 4).

Count Three charged that De La Rosa knowingly concealed, and facilitated the transportation and concealment of, approximately two ounces of heroin, which, as he then and there well knew, had been imported and brought into the United States contrary to law, and that appellant knowingly aided, abetted, counseled, induced, and procured the commission of that offense (C.T. 5).

Count Four charged that appellant and De La Rosa knowingly

and unlawfully received, concealed, and facilitated the concealment and transportation of four grains of heroin which, as the defendants then and there well knew, previously had been imported into the United States contrary to Title 21, United States Code, Section 174 (C.T. 6).

Counts One and Four alleged offenses occurring in the Central Division of the Southern District of California, and the other counts alleged offenses occurring in Imperial County in the Southern Division (C.T. 2-6).

Jury trial of appellant commenced on February 1, 1966, before United States District Judge Fred Kunzel. Appellant was found guilty as charged on February 2, 1966. The Court then ordered a judgment of acquittal as to Count One (C.T. 7-9).

On February 11, 1966, appellant was sentenced to the custody of the Attorney General for five years upon each of the remaining counts, the sentences upon Counts Three and Four to run concurrently. Execution of sentence was suspended as to Counts Three and Four, with probation for five years, to commence upon completion of the sentence upon Count Two (C.T. 10). Appellant thereafter filed notice of appeal (C.T. 12).

III

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

1. Insufficient evidence because Investigator Miller's

testimony should have been excluded because he gave the English translation of a conversation without remembering the original Spanish terminology employed in the conversation.

2. Insufficient evidence because Investigator Miller's testimony should have been excluded because he did not properly refresh his recollection from a document.

3. Insufficient evidence because Investigator Miller's testimony should have been stricken because his original rough notes were destroyed.

4. Alleged error in coercion of a co-defendant, allegedly depriving appellant of necessary testimony.

5. Alleged error in instructing the jury upon reasonable doubt.

6. Insufficient corroboration of appellant's admissions.

IV.

STATEMENT OF THE FACTS.

On September 13, 1965, Jose De La Rosa entered the United States from Mexico at Calexico, California. He was driving an automobile and was accompanied by his wife (R.T. 98, 103, 139).[2]

---

[2] "R.T." refers to the Reporter's Transcript. There is some duplication in the numbering of the pages. Pages 1-21 appear at the commencement of the transcript and again at the end. In this brief, reference to pages 1-21 will refer to the earlier portion of the transcript.

At that time De La Rosa had approximately two ounces of heroin in his possession. An officer found the heroin in his pocket (R.T. 99, 139-40). The heroin had an estimated value of $250 an ounce on the Mexican side of the border (R.T. 178).

In De La Rosa's pocket there was a telephone number with the word, "Important," in Spanish, and the name, "Mr. Lugo." De La Rosa failed to reveal this when asked to remove everything from his pockets, although he did remove other items (R.T 107). Customs officers decided to go to Los Angeles to attempt to make a delivery of the heroin (R.T. 173-74). De La Rosa, his wife, and the heroin were taken to the Customs Agency office in Los Angeles, where approximately four grains of heroin from the original seizure were placed in a "dummy" package containing milk sugar mixed with other ingredients in order to create a color similar to that of heroin (R.T. 108-09, 182-84, 216-17). The heroin was not visible from the outside (R.T. 216).

Two or three telephone calls were made to the telephone number that was found in De La Rosa's possession. Appellant lived in the house which had that particular telephone number (R.T. 173-74). When one of these calls was made, a female answered on the other end and De La Rosa asked for appellant. The female stated that appellant was in the bathroom and could not come to the telephone at that time. De La Rosa said, "Well, tell him to come over to the house. I have something to show him and he'll know what it is." Appellant arrived at De La Rosa's home about

15 minutes later (R.T. 174-75, 177).

Before appellant arrived, the "dummy" package containing the heroin and other substances was placed in a sewing machine by De La Rosa (R.T. 110-111). Customs Agent James Jackson and Customs Port Investigator Owen Miller hid in a closet of De La Rosa's residence, and other officers hid in the kitchen area (R.T. 104, 109-110, 143).

After appellant arrived in De La Rosa's apartment, he had a conversation with De La Rosa. Appellant asked him if he had got it. De La Rosa said that he had. Appellant asked how the trip went. De La Rosa said that it had gone well. Appellant asked, "Did it go as you told me?" De La Rosa indicated that it had. Appellant subsequently asked, "Where is it?" He then asked, "Is that all of it?" De La Rosa said, "Like brothers," meaning "honest" or "truthfully." Appellant asked, "Is that all you could get?" De La Rosa replied that he had his part (R.T. 149-50, 152, 154).

De La Rosa asked, "Where is your kit?" Appellant stated that he did not have it with him and indicated that he was going home to "fix up" (take some narcotics). The officers left the closet and arrested appellant (R.T. 111, 153).

The term, "kit," is a word sometimes used to describe the paraphernalia used by a narcotics addict for the injection of heroin (R.T. 200).

The conversation between De La Rosa and appellant had been

in Spanish. Part of the conversation was not overheard by Investigator Miller, who testified concerning the portions of the conversation overheard by him. Miller had spoken Spanish throughout his life. In fact, it was the first language that he had ever learned (R.T. 146, 158).

Miller stated that part of his testimony concerning the conversation was from his recollection as refreshed by an exhibit (R.T. 149). His memory was refreshed from a document that he had dictated on September 15 or the following day. Miller believed that his original notes were destroyed after the document had been dictated and typed. He did not remember whether the original notes were in Spanish (R.T. 154, 156-58).

De La Rosa had entered the United States at approximately 10 p.m. on September 13. The telephone calls to appellant were mad between 9 and 10 a.m. on the following morning (R.T. 98, 173-79).

After the officers left De La Rosa's closet and approached appellant, the "dummy" package containing heroin and other substances was found in appellant's pocket. Appellant was advised of his legal rights and stated that the contraband that was found in his pocket was not his and that De La Rosa had given it to him. He said that he just couldn't throw it away. Then he reduced his voice to a whisper and said to Customs Agent Harold Diaz, "I want to talk to you alone. I'm working for you." Diaz escorted appellant into another room, where appellant stated that he was

working for a Federal narcotics officer and had come over to get the "stuff" to help the officers arrest De La Rosa. He was unable to name or describe the officer and said that he did not know the name of the organization that he worked for. Finally he admitted that he had never met the officer for whom he claimed to be working, but added that he had an appointment to meet the officer at 10 o'clock (R.T. 111-113, 181-82, 188).

Agent Diaz checked with the Federal Bureau of Narcotics office in Los Angeles and the Customs office in San Diego. Appellan was not working for those agencies and also was not working for the Customs office in Los Angeles (R.T. 189).

Appellant called no witnesses at the trial (R.T. 217).

The record upon appeal also includes some testimony that was not heard by the jury. A report stated that De La Rosa had told the officers that he had been approached by appellant to purchase heroin on a trip to Mexicali, that appellant gave him $200 with which to purchase narcotics and told him where to make contact, that he bought two ounces of heroin (half for Lugo) for $400. (R.T. 11-12).

On November 17, 1965, De La Rosa pleaded guilty to one count of an indictment and stated that the agents had forced him to deliver a white substance to appellant. He also stated that he did not remember everything because he was "drugged at the time. . ." In regard to the conversation with appellant in the apartment, De La Rosa stated:

"That is very possible that he asked me, 'How did the trip go? Did you score?' because he knew that my car was not in good condition and it needed oil." (R.T. 9, 13-14).

De La Rosa was sentenced to the custody of the Attorney General for 15 years with a suggestion that he testify in the case and tell the truth, which the Court would take into account. He was told that the sentence could be modified during a 60-day period (R.T. 18).

Appellant's counsel stated that on the day of De La Rosa's sentence, De La Rosa testified at the trial of appellant and implicated appellant as having been a conspirator in the smuggling offense, and that appellant was convicted and his motion for new trial was granted (R.T. 70-72). He also stated that De La Rosa's 15-year sentence was vacated, his plea of guilty was withdrawn, and he was allowed to reinstate a not guilty plea (R.T. 78).

De La Rosa's attorney stated that at the time that the motion for new trial was granted, "it was my understanding by stipulation of counsel that Mr. De La Rosa's testimony would no longer be needed, either for the United States or for the defense." (R.T. 86).

During appellant's second trial, De La Rosa was called as a witness outside of the presence of the jury. He testified to the effect that appellant was completely innocent. The Court

concluded that "I think this witness is just totally unreliable." (R.T. 95).

V.

ARGUMENT

A. TESTIMONY CONCERNING A CONVERSATION WAS ADMISSIBLE ALTHOUGH THE WITNESS COULD NOT REMEMBER THE ORIGINAL SPANISH TERMINOLOGY INVOLVED IN THE CONVERSATION.

Appellant contends that the evidence would be insufficient without Investigator Miller's testimony regarding the conversation in the apartment, and that Miller's testimony should have been stricken because he did not recall the original Spanish terminology employed in the conversation.

However, Miller testified from his existing memory as refreshed by a document (R.T. 149). It has been held that anything may be used to refresh the memory of a witness.

United States v. Rappy, 157 F. 2d 964 (2nd Cir. 1946);

Portman v. American Home Products Corp., 201 F. 2d 847, 850 (2nd Cir. 1953).

"Anything may in fact revive a memory: a song, a scent, a photograph, and allusion, even a past statement known to be false."

Rappy, supra, at p. 967.

Appellant asserts that he could not test the accuracy of Miller's translation, because Miller did not remember the original

Spanish terms employed in the conversation. However, it is not essential that a witness to a conversation remember the exact words employed. It is sufficient if a summary or substance of the conversation is remembered by the witness. This is evident from the decisions in Asaro v. Parisi, 297 F. 2d 859, 863 (1st Cir. 1962); and Rees v. Bank Building and Equipment Corporation, 332 F. 2d 548, 552 (7th Cir. 1964).

Since a witness may testify concerning the substance of a conversation in English, it is evident that he may do the same regarding a conversation in Spanish, particularly where he is so familiar with the language that he does his thinking in Spanish (R.T. 154) and where the record contains no conflict concerning the accuracy of his testimony.

Neither reason nor precedent supports appellant's position. In an age when international business transactions in various languages are commonplace, and where witnesses must of necessity rely upon business records, the search for truth in the courtroom would suffer a severe blow if the appellate courts adopted a rule prohibiting evidence of conversations where the witness could not remember the exact words employed in a foreign language. To expect any witness to recall verbatim a conversation of reasonable length, occurring several months or several years previously, is to expect too much.

Appellant relies upon a 1911 Hawaii case, an 1859 Illinois

case, and a 1939 Connecticut decision which bear little resemblance to the facts of the instant appeal. In Hawaii v. Kuwano, 20 Hawaii 469 (1911), the defendant, charged with perjury, contended that the witness was improperly translating, from Japanese to English, the previous testimony that was the essence of the perjury prosecution. It was held that the trial court committed error in refusing to permit the defense to cross-examine the witness concerning the exact Japanese words employed in the previous testimony. There was a vital distinction between Kuwano, in which the witness may have remembered the Japanese statements verbatim, and the instant case, in which the appellant claims that the witness did not remember the Spanish statements verbatim. Furthermore, during the trial of the instant case, appellant did not establish that Miller could not testify concerning the exact Spanish words employed in the conversation. His counsel asked Miller to place his recollection of the Spanish words in writing (R.T. 165). Miller apparently misunderstood the request and merely translated a written summary of the conversation from English to Spanish. Appellant did not pursue the matter in order to determine whether Miller remembered the Spanish terms employed in the conversation (R.T. 203-04). In Kuwano, such an attempt was made and was frustrated by the ruling of the trial judge.

In Schnier v. People, 23 Ill. 1 (1859), the witness remembered the key German word that was in issue and the defense

was not allowed to demonstrate that the word had more than one meaning. The opinion states that it is always "desirable" that the witness detail the same language used in the conversation "as far as possible . . . ." (at p. 23). The same statement appears in Schnier, supra. In the instant case, the possibilities of the witness's ability to remember the Spanish words were not exhausted. Furthermore, in both Kuwano and Schnier the translations were in dispute; in the instant case, it was not.

Appellant also relies upon State v. Perelli, 5 A. 2d 705 (1939), in which a written interpretation of statements made in the Italian language was not admissible because it contained assumptions or versions rather than "mere interpretation" (at p. 708). In the instant case, the situation is exactly the reverse. The testimony presumably contained mere interpretation rather than assumptions or editorializing.

It should be noted that testimony concerning part of a conversation is admissible although the witness did not hear all of the conversation.

> Olmstead v. United States, 19 F. 2d 842, 846 (9th Cir. 1927), affirmed, 277 U.S. 438 (1928);
>
> United States v. Schanerman, 150 F. 2d 941, 944 (3rd Cir. 1945).

Since appellant's attack upon the sufficiency of the evidence is limited to the question of the admissibility and

weight of Miller's testimony (Appellant's Opening Brief, p. 19), there will be no review of the entire evidence at this point. Of course, the claim of insufficient evidence would not apply to Count Four of the indictment, even if Miller's testimony was to be rejected, because conviction upon Count Four, alleging concealment, etc., of four grains of heroin in Los Angeles County, could be based upon the evidence of appellant's possession of that heroin (R.T. 111-12, 216-17), with the application of the statutory presumption under Title 21, United States Code, Section 174. Proof of possession alone is sufficient to support a conviction under 21 U.S.C.A. 174.

Harris v. United States, 359 U.S. 19, 22, 23 (1959);

Stoppelli v. United States, 183 F. 2d 391, 394 (9th Cir. 1950), cert. denied, 340 U.S. 864 (1950);

Chavez v. United States, 343 F. 2d 85, 87 (9th Cir. 1965).

Consequently, appellant's argument does not apply to the sufficiency of the evidence under Count Four.

B. INVESTIGATOR MILLER PROPERLY REFRESHED HIS MEMORY FROM A DOCUMENT.

Appellant asserts that the evidence would be insufficient without Investigator Miller's testimony and that the latter should have been stricken because he improperly refreshed his memory from an English translation of the conversation in the apartment. Appellant states that Miller's memory was not actually refreshed,

have been stricken because he had destroyed the original notes relating to his testimony.

However, a witness does not become incompetent to testify merely because some original notes relating to his testimony have been destroyed.

Killian v. United States, 368 U.S. 231, 242 (1961);

United States v. Baker, 358 F. 2d 18, 20 (7th Cir. 1966);

United States v. Hilbrich, 341 F. 2d 555, 557 (7th Cir. 1965), cert. denied, 381 U.S. 941 (1965).

While the above-cited decisions do not suggest that notes cannot be properly destroyed unless the exact contents are transferred to another paper, it should be noted that the trial Judge apparently concluded that the notes were consistent with the document that was shown to the defense:

> "The evidence indicates that he dictated from his notes within two days after the incident and the dictated notes he said were compared--rather, he didn't destroy his original notes until he had received a rough copy of what he dictated from the stenographer." (R.T. 165).

Appellant relies upon Ogden v. United States, 323 F. 2d 818 (9th Cir. 1963), and United States v. Lonardo, 350 F. 2d 523 (6th Cir. 1965). In Ogden the Court specifically declined to rule upon the issue (at pp. 820-21), although it cited a number of authorities (footnote 4 at p. 821) supporting appellee's

position herein and none to the contrary. In Lonardo, the Court of Appeals specifically limited its opinion to cases in which the prior statement was deliberately destroyed "on the eve of the trial." (at p. 529). Consequently, appellant derives little support from the limited holding in Lonardo.

Appellant emphasizes the fact that the destroyed notes may have been in Spanish and that the preserved statement was in English, causing a loss of the original Spanish. An analogous argument was unsuccessful in the United States Supreme Court:

> "As to petitioner's contention that the claimed destruction of the agents' notes admits the destruction of evidence, deprives him of legal rights and requires reversal of the judgment, it seems appropriate to observe that almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed. If the agents' notes of Ondrejka's oral reports of expenses were made only for the purpose of transferring the data thereon to the receipts to be signed by Ondrejka, and if, after having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right."

Killian, supra, at p. 242.

In Spindler v. United States, 336 F. 2d 678, 681 (9th Cir. 1964), cert. denied, 380 U.S. 909 (1965), where there was a contention that an officer had destroyed notes, this Court noted that there was no positive showing that the notes had ever been in existence. In the instant case, we do not have a positive showing to support appellant's basic claim, i.e., that the original notes were in Spanish. The officer testified that he could not remember whether the original notes were in Spanish or English (R.T. 154).

Appellant's basic argument involves sufficiency of the evidence. Here again, the argument would not apply to Count Four of the indictment, due to the presumption under 21 U.S.C.A. 174.

D. A FAIR TRIAL OF APPELLANT WAS NOT PRECLUDED BY THE ALLEGED COERCION OF A CO-DEFENDANT.

Appellant states that co-defendant De La Rosa was coerced into testifying against appellant in his first trial, that as a result, appellant's motion for new trial was granted, and De La Rosa could not be called as a witness for appellant at the second trial because he could be impeached by the testimony at the first trial, which allegedly was the product of coercion.

In effect, appellant is arguing that he is forever immune from prosecution because another person was coerced at one time in the past.

Appellant does not contend, of course, that the alleged coercion carried over into his second trial, preventing the possibility of favorable testimony by De La Rosa. De La Rosa was prepared to testify that appellant was completely innocent at the time of the second trial (R.T. 95). Appellant elected not to call him as a witness. (There was mention of a previous stipulation that neither side would call De La Rosa as a witness at the second trial, R.T. 86).

The short answer to appellant's impeachment argument is the fact that he could have called De La Rosa as a witness and then could have objected to the impeaching material in the event that it was offered by the prosecution. If his position was sound, the impeaching material would be inadmissible. If his position was erroneous, he would have nothing of which to complain.

In the event that De La Rosa's testimony from the first trial was ruled inadmissible, it is extremely doubtful that appellant would have called him as a witness. De La Rosa could have been impeached by evidence of statements made long before the alleged coercion occurred. Furthermore, his explanations upon behalf of appellant were highly entertaining but hardly calculated to convince the most naive listener. For example, he stated that appellant possibly asked him, "Did you score?" because "he knew that my car was not in good condition and it needed oil." (R.T. 14).

The second major difficulty in appellant's position is

his failure to present the issue to the trial Court during the trial. Appellant argued at trial that De La Rosa was still subject to the earlier coercion (R.T. 79-80). This argument collapsed when De La Rosa proved that he would ignore the "coercion" and claimed that appellant was innocent (R.T. 95). Appellant raised his new impeachment argument on February 11, 1966, nine days after the conviction (R.T. 287, 290-91). An issue must be raised in a timely fashion in the trial Court.

> Ramirez v. United States, 294 F. 2d 277, 283 (9th Cir. 1961);
>
> Stein v. United States, 166 F. 2d 851, 855 (9th Cir. 1948), cert. denied, 334 U.S. 844 (1948).

E. THE TRIAL COURT DID NOT COMMIT ERROR IN THE INSTRUCTIONS.

Appellant argues that the trial Court gave an erroneous instruction to the jury in regard to reasonable doubt and failed to give an instruction requested by appellant.

Appellant objects to the following discussion of "reasonable doubt" in the instruction that was given: "It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." (R.T. 260).

Appellant specifically objects to the "moral certainty"

and "abiding conviction" portion of the instruction. The United States Supreme Court has approved a "reasonable doubt" instruction that included the following language:

> "Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain that it exists."
>
> Miles v. United States, 103 U.S. 304, 309, 312 (1881) (Emphasis added).

The instruction given by the trial Court is a standard California instruction that has had statutory sanction since 1927.

California Penal Code Sections 1096, 1096a.

It is probably more favorable to the defendant than the law requires, because it requires the jurors to be morally "certain" of guilt. "Certainty" is something not normally found in human affairs. However, appellant may not object that the instruction was more favorable to him than he deserved it to be.

Appellant cites McGill v. United States, 348 F. 2d 791 (C.A.D.C. 1965), and United States v. Byrd, 352 F. 2d 570 (2nd Cir. 1965). In McGill the majority opinion suggested that certain language must be added to the "abiding conviction" phrase upon request by counsel (at pp. 797-98). This specific language was not requested in the instant case, so the holding in McGill does not apply.

In Byrd, supra, the "moral certainty" phrase was criticized, but it can hardly be contended that this 2-1 decision has the effect of silently overruling the United States Supreme Court opinion in Miles, supra.

Furthermore, appellant failed to comply with Rule 30 of the Federal Rules of Criminal Procedure, which provides that a party may not assign as error any portion of the charge or omission therefrom unless he objects, "stating distinctly" the matter to which he objects. Appellant objected to the "reasonable doubt" instruction but did not mention the "abiding conviction" and "moral certainty" provisions presently subject to question. His argument in the trial Court was primarily devoted to support for his proposed alternative instruction rather than an attack upon the standard California instruction that was given (R.T. 218-20, 283-84). Having failed to inform the trial Court of the alleged defect, he cannot raise the question at this time.

McGill v. United States, supra, at 797.

Appellant also complains of the trial Court's refusal to give the instruction requested by appellant, which provided that the jurors could not find appellant guilty unless they were "almost certain" of his guilt (C.T. 11). In absence of any legal authority to support such an instruction, it is respectfully submitted that the time-honored instructions upon reasonable doubt were adequate in this case.

F. THERE WAS NO VIOLATION OF THE CORPUS DELICTI RULE.

Appellant contends that there was insufficient corroboration of his admissions to support the conviction This argument would not apply to Count Four of the indictment, because possession alone is sufficient to sustain the conviction under that count.

The evidence under the other counts should be viewed in the light of the general rule to the effect that the corpus delicti may be established by substantial independent evidence tending to establish the trustworthiness of the admissions.

Opper v. United States, 348 U.S. 84, 93 (1954).

It is respectfully submitted that the Opper test was satisfied in the instant case.

Furthermore, the corpus delicti rule does not always apply to admissions made as part of the commission of the crime itself.

People v. Fratianno, 132 Cal. App. 2d 610, 628 (1955). The most important "admissions" in the instant case were made while the crimes were being committed, i.e., during the discussions between appellant and De La Rosa in the apartment. The corpus delicti rule was intended to lessen the possibility of convicting an innocent man who confesses as a result of some mental quirk.

Burdick, The Law of Crime, Vol. 2, p. 108.

It was not intended to apply to a suspect's conspiratorial discussions overheard by witnesses, whether the witnesses are co-conspirators or law enforcement officers.

VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney,

MOBLEY M. MILAM,
Chief Assistant U.S. Attorney,

PHILLIP W. JOHNSON,
Assistant U.S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PHILLIP W. JOHNSON

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[illegible], Appellant, -vs- [illegible] OF AMERICA, Appellee.	No. [illegible] AFFIDAVIT OF SERVICE BY MAIL

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF CALIF. } ss.

[illegible], being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of San Diego County, California; that her business address is 325 West "F" Street, San Diego, California; that she is over the age of eighteen years, and not a party to the above-entitled action;

That on [illegible] she deposited in the United States Mails, San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of [illegible]

addressed to [illegible] last known address, at which place there is a delivery service by United States Mails from said post office.

SUBSCRIBED and SWORN to before me, [illegible]

this [illegible] day of [illegible], 19[illegible].

WILLIAM W. LUDDY, Clerk, U.S. District Court
Southern District of California

No. 21,172 A & B

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee and Petitioner,

vs.

ALAN HARVEY RICE, LAWRENCE SANFORD TOROKER, EDDIE JAVOR,

Appellants and Respondents.

PETITION FOR REHEARING.

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
RONALD S. MORROW,
Assistant U. S. Attorney,
1200 U. S. Courthouse,
312 North Spring Street,
Los Angeles, Calif. 90012,
688-2434; 688-2413,
Attorneys for Appellee and Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

No. 21,172 A & B

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee and Petitioner,

vs.

ALAN HARVEY RICE, LAWRENCE SANFORD TOROKER, EDDIE JAVOR,

Appellants and Respondents.

PETITION FOR REHEARING.

To the Honorable Judges: Browning and Ely of the United States Court of Appeals for the Ninth Circuit and Foley of the District of Nevada, sitting by designation.

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, appellee herein respectfully petitions this Court for rehearing in the above-captioned case. The judgment of this Court was rendered on July 17, 1968, and by order of Judge Ely the United States has to and including August 16, 1968, within which to file this petition.

The Court Has Misapprehended the Effect of Bruton v. United States on the Case at Bar.

In the *Per Curiam* opinion of this Court the conviction of Eddie Javor was reversed for the stated reason that *Bruton v. United States,* ..... U.S. ....., 36 U.S.L.W. 4447 (decided May 20, 1968), "requires reversal" [P. 3, Slip Opinion].

Bruton does not apply because the prior statements of Toroker and Rice were admitted for impeachment as to them only (and, therefore, within a recognized exception to the hearsay rule); Toroker and Rice testified for Javor; Toroker and Rice were subject to confrontation; and the prior statements of Toroker and Rice were not used until after they took the stand and testified for Javor.

Bruton, supra, at 4448, states that the admission of the co-defendant's "confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment . . ." The facts of *Bruton* were that neither defendant testified or offered any evidence at the trial, *Evans v. United States,* 375 F. 2d 355, fn. 2 at 357 (8th Cir. 1967). The confession of Evans was used in the prosecution's case-in-chief.

No reference was made as part of the Government's case-in-chief to the fact that Toroker and Rice named Javor as their source of narcotics in post arrest statements. At 514 of the Reporter's Transcript appears a stipulation that Toroker and Rice had confessed. Both Toroker and Rice stipulated that on an earlier occasion they had confessed to the crimes alleged in the indictment.

The defense of the defendants Toroker and Rice was that they had taken LSD over extensive periods of time and transferred the narcotics in question out of a feeling of love for the agents; the agents' "need"; and the agents' threats. The attorneys for Toroker and Rice stated that the defense was that neither man could resist the "persuasion, inducements, and enticements" of the agents [R. T. 536-42; 543-46].

After Toroker related his experiences with LSD and his motivation for doing what he did, he stated on direct examination by his attorney that "Nick" was the source of the narcotics [R. T. 701-02; 705; 710; 711; 715-16]. During examination of Toroker by Javor's attorney, Toroker testified that he knew Javor only in connection with redecorating [R. T. 869-72]. On cross by Government counsel Toroker again said it was "Nick" who provided the narcotics [R. T. 898; 939-40], and said he had not told the agents about "Nick" [R. T. 907]. It was at that point in the trial, and not before, that the Government was allowed to use the previous statement of Toroker for impeachment purposes only as to the source, and the connection with Javor [R. T. 948-59; 962-63; 965-67; 971; 973-74]. Judge Curtis instructed the jury that the use of the prior statement applied only to Toroker at R. T. 941-48; 951; 955; 956; 958; 966; 967; 968 and 974. Following the use of the prior statement by the prosecution, Toroker's attorney used the written statements for rehabilitation and Toroker denied, as a matter of fact, that Javor was the source [R. T. 1000-11]. Javor's attorney then brought out that Javor was not the source [R. T. 1012].

Rice, in his direct testimony, made only one reference to "Nick," at R. T. 1054, and did not mention that he knew Javor in connection with redecorating. Rice's reference to "Nick" was as follows: "And Mickey said, 'Yeah, sure.' His boy Nick could supply anything." Javor's own attorney, at R. T. 1076, called Rice as Javor's witness and elicited, at 1077, that Rice's connection with Javor was relative to roof, lighting, upholstery work, a wet bar and "things like this." It was only after Rice testified in answer to Javor's calling him that any reference was made to the previous statements of Rice as to Javor being his source.

There is only one conclusion that can be drawn from the trial testimony of Toroker and Rice—Javor, Toroker, and Rice agreed that Toroker and Rice would exonerate Javor as the source. The testimony of Toroker and Rice relative to "Nick" and Javor had no relevance or materiality to their own defense. To believe that the "Nick" and redecorating testimony was anything more than directed to aiding Javor is unrealistic.

In *Bruton* the Supreme Court said the following, in footnote 3:

> ". . . There is not before us . . . any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatsoever that such exceptions necessarily raise questions under the Confrontation Clause."

In the instant matter there is the "recognized exception to the hearsay rule"—the right to use prior inconsistent statements for impeachment purposes. Javor examined Toroker on the "Nick" and redecoration de-

fenses of Javor and, in fact, called Rice as his own witness on the redecorating defense. The Government views the present decision as leading to the undesirable, and unavoidable, conclusion, that if Javor were being tried at a severed trial, and he called Toroker and Rice to exonerate him, that the prior inconsistent statements would be inadmissible. There is no logical distinction between an accomplice and a non-accomplice when the issue is that particular witness' credibility.

It was only after Toroker and Rice had testified that their prior written statements were used for impeachment.

> "Under the circumstances the government was not required to stand idly by and let the testimony go unchallenged." *United States v. Grosso,* 358 F. 2d 154, 162 (3rd Cir. 1966), *rev'd on other grounds, Grosso v. United States,* 390 U.S. 62 (1968).

Grosso, is the last case that has been located that has reached the Supreme Court on a *Walder, Infra.,* situation. In *Grosso,* Grosso stated he had had no connection with a numbers lottery since 1950. The prosecution was allowed to introduce evidence which showed such connection.

In *Walder v. United States,* 347 U.S. 62 (1954), the prosecution had in its possession evidence relative to a prior possession of narcotics which had been ordered suppressed. The defendant took the stand and testified he had never had any narcotics in his possession. The Supreme Court stated its issue was "whether the defendant's assertion on direct examination that he had never possessed any narcotics opened the door, solely for the

purpose of attacking the defendant's credibility, to evidence of the heroin unlawfully seized in connection with the earlier proceeding." The Supreme Court, at 65, answered the issue posed in the affirmative with the following:

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the "Weeks" doctrine would be a perversion of the Fourth Amendment.
>
> Take the present situation. Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics. Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." (Citations omitted.)

In the instant case Toroker and Rice went "beyond a mere denial of complicity" when they attempted to

exonerate Javor. In the instant case the evidence used was not illegally or unconstitutionally obtained but, merely inadmissible in the Government's case-in-chief under the retroactive application of *Bruton.*

Groshart v. United States, No. 21,517 (9th Cir., decided March 27, 1968), is the only Ninth Circuit case found which mentions *Walder. Groshart* specifically does not apply to the instant case. In footnote 5 of the Slip Opinion the Court states that its judgment only holds that *Miranda* undercuts *Walder* when statements are *obtained* in violation of constitutional standards.

In *Bruton* and *Douglas v. Arizona,* 380 U.S. 415 (1965), the factual situations considered in *Bruton,* the testifying witness either did not testify at all or refused to testify. In such a situation there is truly no confrontation. In the instant case there is not only a confrontation but a calling for on cross and direct the matter which opened the door.

Conclusion.

To allow the Court's present decision to stand will invite perjury in future trials whether the witnesses are or are not parties to the action.

Respectfully submitted,

Wm. Matthew Byrne, Jr.,
United States Attorney,

Robert L. Brosio,
Assistant U. S. Attorney,
Chief, Criminal Division,

Ronald S. Morrow,
Assistant U. S. Attorney,

Attorneys for Appellee and Petitioner.

No. 21173

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRACE MANCILLA,
APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.,
APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF AND APPENDIX FOR APPELLEES

BAREFOOT SANDERS,
Assistant Attorney General,

CECIL F. POOLE,
United States Attorney,

MORTON HOLLANDER,
JACK H. WEINER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

I N D E X

C I T A T I O N S

Cases:

Page

Statutes and Regulations:

Statutes:

Regulations:

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21173

GRACE MANCILLA,
APPELLANT
v.
UNITED STATES OF AMERICA, ET AL.,
APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF AND APPENDIX FOR APPELLEES

JURISDICTIONAL STATEMENT

This is an appeal from an order of dismissal and summary judgment in favor of the appellees, the United States of America and the members of the Civil Service Commission. The order in question was entered by the District Court for the Northern District of California on March 18, 1966 (R. 60-61).

Appellant apparently is invoking this Court's jurisdiction under 28 U.S.C. 1291.

STATUTE INVOLVED

The Lloyd-LaFollette Act, 37 Stat. 555, 5 U.S.C. 652(a) provides:[1/]

1/ Throughout this brief, references to title 5 of the United States Code are to the 1964 edition. By Public Law 89-554, approved September 6, 1966, 80 Stat. 378, title 5 was recodified. 5 U.S.C. 652(a) is now set forth at 5 U.S.C. 5592. The recodification makes no substantive change affecting this case.

Removal without pay from classified civil service --

(a) Only for cause; notice; copy of charges, time to answer; examination; record; persons exempt

No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges prefered against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal of suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. This subsection shall apply to a person within the purview of section 863 of this title, only if he so elects.

STATEMENT OF THE CASE

1. The Administrative Proceedings.

Appellant Grace C. Mancilla was a civilian employee of the Department of the Army, employed as a G.S.-3 stock control clerk at the Defense Subsistence Supply Center in Alameda, California (R. 15-16). On August 23, 1963, she was notified that it was proposed to remove her from her position at the close of business September 30, 1963 on

the grounds of "Insubordination (refusal to obey orders and impertinence), creating disturbances among fellow employees, resulting in an adverse affect upon morale, production and maintenance of proper discipline" and "inefficiency and unsatisfactory performance of your duties" (R. 16-20). This notice cited ten specifications in support of the charges (R. 16-20). The appellant was informed that she had ten days in which she could answer the charges personally and/or in writing and could submit affidavits (R. 20).

Appellant responded to the charges and submitted statements of character witnesses (Exh. C-6(a) through C-6(m)). However, she was later informed by the Chief of the Civilian Personnel office that the charges against her were fully supported by the evidence, and that she would be removed on September 30, 1963 (Exh. C-6, p. 2, App. 2a).[2/] At the same time, appellant was informed that she either could appeal under the Defense Supply Agency's Grievance Procedure or could appeal to the United States Civil Service Commission.[3/] (App. 4a).

Appellant, represented by counsel, initiated an appeal

2/ Pertinent portions of the Exhibits attached to the Motion for Summary Judgment are set forth in the Appendix, infra, 1a-35a, to this brief, referred to herein as "App." "R" references are to the reproduced record on appeal.

3/ Section 14 of the Veterans' Preference Act, 5 U.S.C. 863, now 5 U.S.C. 7701 was made applicable to non-veteran civilian employees by Executive Order 10988, 27 Fed. Reg. 551.

under the Defense Supply Agency's Grievance Procedure (Exh. C-1) but later withdrew that appeal and appealed instead to the Civil Service Commission (Exh. C-2)

In a letter dated October 22, 1963, appellant's attorney requested a hearing (Exh. E, App. 4a-5a). On November 5, 1963, she wrote the Civil Service Commission requesting the date of the hearing "so that we can give the list of persons to you we wish to have subpoened [sic] in behalf of Miss Mancilla." (Exh. F., App. 6a). By letter dated November 6, 1963, the Civil Service Commission advised counsel that "no arrangements have been undertaken with regard to a hearing" (Exh. G, App. 7a). The Commission further informed appellant's counsel (Exh. G, App. 7a):

> The Commission does not have subpoena power, but if a hearing is requested by the appellant, the agency will be invited to participate. However, it will be the responsibility of the parties to the appeal to make arrangements for the appearances of any witnesses whose presence they desire.

By letter of November 14, 1963, appellant's counsel informed the Commission that they were unaware of the Commission's lack of subpoena power (Exh. I, App. 8a-9a). Counsel went on to state that she wanted documents subpoenaed and "We will provide you with a list of persons we desire to have available, and will object to any affidavits being considered by the Commission signed by persons we have not been given the opportunity to cross-examine" (Exh. I, App. 9a). In response,

the Commission pointed out on November 20, 1963, that the Commission does not have subpoena power and cannot compel the attendance of any witnesses at the hearing which it holds upon the appeal." (Exh. K, App. 11a).

On December 2, 1963, the appellant examined all of the affidavits of her fellow workers in the investigation and requested a formal hearing (Exh. L, App. 12a).

On December 5, 1963, the Civil Service Commission informed the appellant and her counsel that the hearing was scheduled for Monday, December 16, 1963. (Exh. M., App. 13a). The Commission also reminded appellant that (Exh. M, App. 13a):

> * * * the Commission cannot require the attendance of any witnesses at its hearing, * * *. It is suggested, therefore, that since the responsibility for presenting witnesses at the hearing rests upon the parties to the appeal, any request that you may have for the agency to present particular witnesses should be submitted to the Personnel Office at the Defense Alameda Facility.

A hearing was held before a hearing officer of the Civil Service Commission, San Francisco Region. The appellant presented a former co-worker as witness. The agency presented Mrs. Jones, the appellant's supervisor, who had initiated the proceedings. The appellant, through her counsel, cross-examined Mrs. Jones (Exh. O-1, App. 20a-36a).

The Commission, on January 3, 1964 ruled that none of appellant's procedural rights had been violated, that her

removal from Government employment was warranted, and that the removal was effected for the purpose of promoting the efficiency of the service (Exh. O, App. 19a) Appellant then appealed to the Civil Service Commission's Board of Appeals and Review, which affirmed the decision of the San Francisco Regional Office (Exh. R, App.37a-39a, R. 23-25).

2. The Proceedings in the District Court.

Mrs. Mancilla then filed this action for judicial review (R. 15-28). On the motion to dismiss filed on behalf of the United States and on the motion for summary judgment filed on behalf of the individual Civil Service Commissioners (R. 46-59 and Exhibits attached thereto), the district court dismissed the complaint against the United States for want of jurisdiction and granted summary judgment in favor of the other appellees (R. 60-61). This appeal was then taken.

ARGUMENT

APPELLANT'S REMOVAL FROM HER JOB WAS IN COMPLIANCE WITH THE REQUIRED PROCEDURES OF THE LLOYD-LAFOLLETTE ACT AND THE CIVIL SERVICE COMMISSION REGULATIONS.

As this Court has repeatedly recognized, the function of reviewing courts in cases involving the removal of Federal employees is limited to insuring compliance with the procedures prescribed by federal law. Seebach v. Cullen, 338 F.2d 663(C.A. 9) certiorari denied 380 U.S. 972,

Brancadora v. Federal National Mortgage Association, 344 F.2d 933 (C.A. 9) certiorari denied 382 U.S. 938. There can be no real doubt that there was full compliance with all required procedural steps in the present case.[4/]

Indeed, appellant's principal argument to the contrary is that she was "tricked into believing" that the Civil Service Commission would make arrangements for her witnesses to be present and that only on the day of the hearing did she first discover that no arrangements had been made for her witnesses (Brief, p. 2, 4). However, the record clearly refutes appellant's assertions. As pointed out above, the Civil Service Commission made it clear to the appellant and her counsel in letters of November 6, 1963 (Exh. G, App. 7a), November 20, 1963 (Exh. K, App. 11a), and December 5, 1963 (Exh. M, App. 13a), far in advance of the hearing scheduled for Monday December 16, 1963, that the Civil Service Commission did not have subpoena power and it was "the responsibility of the parties to the appeal to make arrangments for the appearances of any witnesses whose presence they desire." (Ibid).

Thus it is clear that appellant was in no way misled. And it is equally clear that the absence of the subpoena power does not violate the federal employee's due process rights. Jenkins v. Macy, 357 F.2d 62, 68 (CA. 8); Brown v.

4/ The district court also correctly dismissed the complaint as against the United States (R. 60), because the United States was neither a suable party nor the proper defendant in this case. Blackmar v. Guerre, 342 U.S. 512, 515; McEachern v. United States, 321 F.2d 31, 33 (C.A. 4).

Zuckert, 349 F.2d 461, 463-64 (C.A. 7) certiorari denied 382 U.S. 998.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

BAREFOOT SANDERS,
Assistant Attorney General,

CECIL F. POOLE,
United States Attorney,

MORTON HOLLANDER,
JACK H. WEINER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

MARCH 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Cour of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Jack H. Weiner
JACK H. WEINER

A P P E N D I X

INDEX TO APPENDIX

EXHIBIT C-6

ALAMEDA ANNEX
SHARPE ARMY DEPOT
2155 WEBSTER STREET
ALAMEDA, CALIFORNIA

SSMSH-OAACP 12 September 1

SUBJECT: Decision: Removal From the Position of Stock Control Clerk, GS-2040-03, $4580.00 Per Annum

TO: Miss Grace G. Mancilla
Headquarters, Oakland Region, DSSC
Distribution Division, Receiving Branch
2155 Webster Street
Alameda, California

* * *

I ACKNOWLEDGE RECEIPT OF LETTER SUBJECT: DECISION: REMOVAL FRO THE POSITION OF STOCK CONTROL CLERK, GS-2040-03, $4580.00 PER AN

13 September 1963
Date

GRACE G. MANCILLA

* * *

2. Reference d. informed you of the proposed removal from your position at the close of business 30 September 1963 as Stock Control Clerk, GS-2040-03, $4580.00 per annum.

3. Full consideration has been given to the information contained in your letters and memos, references e. through q., as well as your oral presentations of 27 and 30 August 1963. The evidence available fully supports the following:

CHARGE 1 INSUBORDINATION, Specifications a., b., and c.

CHARGE 2 INEFFICIENCY, POOR WORK PERFORMANCE AND PRODUCTIO Specification a., b., c., d., e., f., and g. The facts present warrant your removal to promote the efficiency of the service. It is the decision, therefore, that you be removed on 30 Septemb 1963.

4. You have a right in compliance with Section VII, paragraph 7-265, Grievances and Appeals, Defense Supply Agency, Defense Subsistence Supply Center Operating Manual, to submit an appeal personally and in writing to the Commanding Officer,

R. H. Smith, Colonel, USA, of Headquarters, Oakland Region, DSSC, 2155 Webster Street, Alameda, California. Your request for an appeal will be accepted anytime from the date of your receipt of this notice, but not later than 10 calendar days after the effective date of the adverse action. The procedure for filing an appeal will be explained to you by Mr. R. J. Lindsay, Chief, Civilian Personnel Officer, or Miss Josephine Goulart, Chief, Employee Utilization Function in the Civilian Personnel Office.

5. You also have a right to appeal to the Director, San Francisco Region, U. S. Civil Service Commission, 630 Sansome Street, San Francisco 11, California. If you elect to appeal first to the Commission within the time limits specified, you forfeit your right to appeal under the Defense Supply Agency, Defense Subsistence Supply Center appeals system. An appeal may not be processed currently by the Commission under the Commission's regulations and by this activity under the Defense Supply Agency, Defense Subsistence Supply Center appeals system. In order to be considered, any appeal to the Civil Service Commission must:

a. Be in writing

b. Set forth your reasons for appealing with offer of proof and such pertinent documents as you are able to submit, and

c. Be submitted no later than 10 calendar days after the effective date of the adverse (separation) action,

6. The decision of the Commanding Officer, Headquarters, Oakland Region, Defense Subsistence Supply Center, on an appea of an adverse action will be reviewed, upon your request, by the Commander, Defense Subsistence Supply Center, 226 West Jackson Boulevard, Chicago 6, Illinois. The same decision may be appealled to the Civil Service Commission, but NOT to both the Civil Service Commission and the Commander, Defense Subsistence Supply Center. The decision of the Commane Defense Subsistence Supply Center, on an appeal submitted to hi, may not be appealed to the Civil Service Commission.

FOR THE COMMANDING OFFICER:

R. J. LINDSAY
Chief,
Civilian Personnel Office

EXHIBIT E

Law Offices of
MOLLY H. MINUDRI
210 Post Street, Suite 1114
San Francisco,8, California
EXbrook 2-0424

October 22, 1963

United States Civil Service Commission
San Francisco Region
630 Sansome Street
San Francisco 11, California

Attention: Mr. John F. Jackson, Appeals Examiner

Re: Grace C. Mancilla
Your Ref: SF:WGT:mlr
October 7, 1963

Gentlemen:

With reference to your letter of October 7, 1963, and your further letter of October 15, 1963, the following is the information and evidence which Mrs. Gra c e Mancilla wishes

considered in her appeal:

1. Her Civil Service Record of approximately 15 years with the United States Government.
2. A check into purported errors of other employees making entries in the records handled by Mrs. Mancilla which were wrongfully charged to Mrs. Mancilla.
3. A review of the work load of the desk assignment of Mrs. Mancilla.
4. An investigation into the false charge that during an argument Mrs. Mancilla struck Mrs. Ruth Jones, her immediate supervisor.
5. Personnel Record of applications of Mrs. Mancilla for transfers to positions in other Departments.
6. Efficiency reports of Mrs. Grace Mancilla.

We wish to have copies furnished to us of the affidavits which we are informed are in the personnel file from persons in the office of Mrs. Jones and Mrs. Mancilla regarding the incident leading to the dismissal of Mrs. Mancilla.

Mrs. Mancilla will withhold her statement until the time of the hearing, at which time she wishes to tell her story to the hearing officer, hear the story of Mrs. Ruth Jones and other witnesses in her behalf, and give us the opportunity of cross-examination

If there is any further information that your investigator would require, please have him get in touch with us.

Yours very truly,

MOLLY H. MINUDRI

EXHIBIT F

Law Offices Of
MOLLY H. MINUDRI
210 Post Street, Suite 1114
San Francisco,8, California
EXbrooke 2-0424

November 5, 1963

United States Civil Service Commission
San Francisco Region
630 Sansome Street
San Francisco 11, California

Attention: Mr. John F. Jackson - Appeals Examiner

Re: Grace C. Mancilla
Your Ref: SF:WGT:Mlr
October 7, 1963

Gentlemen:

We wrote you on October 22, 1963, concerning the above captioned matter and would like to know the next step in the proceedings.

We have been informed, and this may be incorrect, that certain persons have been subpoened to appear at the Grace Mancilla hearing. If this is true, we believe that we should be advised of the date, so that we can give the list of persons to you we wish to have subpoened in behalf of Miss Mancilla.

May we hear from you?

Yours very truly,

MOLLY H. MINUDRI

EXHIBIT G

Mrs. Molly H. Minudri
210 Post Street, Suite 114
San Francisco, California 94108

Dear Mrs. Minudri:

This acknowledges your letter of November 5, 1963, in behalf of Mrs. Grace C. Mancilla. You asked the question as to the

ext step in the order of the proceedings. Please refer to our etter of October 7 in which there was described the various teps applicable to our processing of the appeal. It was pointed ut that initial investigation would be conducted through correspondenc ith the appellant and the agency concerned, and that in this egard Mrs. Mancilla should submit the information and evidence hich she wished to have considered in her case. We further ointed out that statements submitted by Mrs. Mancilla or by thers in her behalf who have knowledge of her case should be otarized. Although, at your request the time period for sub-itting this evidence was extended, no evidence has been submitted y Mrs. Mancilla. In fact, the basis for her appeal has not een furnished this office.

s soon as the correspondence phase has been completed, the appeal ile will be presented for review by Mrs. Mancilla and you, and at hat time the appellant will be provided opportunity to furnish ny further evidence which she wishes to have considered, and to tate her wishes with regard to a hearing.

ith respect to the second paragraph of your letter of November 5, ou are advised that no arrangements have been undertaken with egard to a hearing. The Commission does not have subpoena ower, but if a hearing is requested by the appellant, the agency ill be invited to participate. However, it will be the respon-ibility of the parties to the appeal to make arrangements for he appearance of any witnesses whose presence they desire.

n view of the lapse of time since the appeal was filed, the nformation and evidence which Mrs. Mancilla wishes us to consider

in her appeal should be furnished to this office not later than November 12, 1963.

FOR THE DIRECTOR

Sincerely yours,

John F. Jackson

EXHIBIT I

Law Offices of
MOLLY H. MINUDRI
210 Post Street, Suite 1114
San Francisco 8, California
EXbrooke 2-0424

November 14, 1963

United States Civil Service Commission
San Francisco Region
630 Sansome Street
San Francisco 11, California

Attention: Mr. John F. Jackson, Appeals Examiner

Re: Grace C. Mancilla
Your Ref: SF:WGT:mlr
October 7, 1963

Gentlemen:

This is in reference to our telephone conversation of Tuesday, November 12, 1963, concerning the above captioned.

We were unaware that you no longer had an investigator who looked into the matters referred to in our letter of October 22, 1963, and we were also unaware of your lack of power of subpoena.

In order to present our case for Mrs. Mancilla it is necessary that we have the records of the work load assignment of the desk. Can we subpoena this?

We believe that the personnel record of Mrs. Mancilla will be available at the time of the hearing. Is this true? Will it contain all matters pertaining to her civil service

employment? We wish the record of her efficiency reports and requests for transfers.

We believe that the case will turn on the question of the truth of the reports of Mrs. Ruth Jones, and this can only be brought out by a hearing and cross-examination as to the events on the day of the incident leading to Mrs. Mancilla's dismissal.

We will provide you with a list of person we desire to have available, and will object to any affidavits being considered by the Commission signed by persons we have not been given the opportunity to cross-examine.

Will you advise us when the file you mentioned over the telephone is available, so that Miss Mancilla and I can make an appointment for the purpose of inspection. I believe that we can then be in a position to prepare our defense and refutation.

We were unable to see the entire file in the personnel office of her agency. We were not allowed to see affidavits submitted against her. That is the reason we abandoned the grievance and appealed to the Civil Service Commission, where we trust we will be treated honorably and given the proper consideration.

Awaiting to hear from you,

Yours very truly,

MOLLY H. MINUDRI

EXHIBIT J

DEFENSE ALAMEDA FACILITY
HEADQUARTERS, OAKLAND REGION
DEFENSE SUBSISTENCE SUPPLY CENTER
2155 Webster Street
Alameda, California

19 Novembe

SUBJECT: Removal - Miss Grace G. Mancilla

Director
San Francisco Region
U.S. Civil Service Commission
ATTN: Appeals Examiner
630 Sansome Street
San Francisco 11, California

1. The following additional information is submitted concerning the evidence upon which the Chief, Civilian Personnel Office, Defense Alameda Facility relied to support the removal charges against Miss Grace G. Mancilla.

2. Inclosure #1 is a true copy of the notes of a conference meeting on 27 August 1963. The purpose of the meeting was for the conveniece of Miss Mancilla and to review personally, with Mrs. Ruth Jones her supervisor, the details of the charges in the proposed removal action. The meeting held in the presence of the Chief, Civilian Personnel Office concluded with the opinion that Miss Mancilla was fully informed of all the acts of insubordination committed by her and her errors in the work performed.

3. Inclosure #2 is a sworn affidavit of a disposition dated 15 July 1963, subject, Grace Mancilla - Personal Conduct on the Job, received from Mrs. Ruth Jones, the supervisor of Miss Grace G Mancilla.

Charge I, Specification a, b, and c were initiated and are supported by the facts related in Inclosure #2. Also inclosed

are the true photostat copies submitted by the six (6) employees who signed statements confirming their observations of the insubordinate acts committed by Miss Mancilla to her supervisor, Mrs. Jones, who initiated the removal action.

4. Inclosure #3 is a sworn affidavit of a disposition dated 17 July 1963, subject, List of More Outstanding Office Disturbances Caused by Grace Mancilla Since 25 February 1963, submitted by Mrs. Ruth Jones, the supervisor.

Charge 2, Specifications a, b, c, d, and e are supported by Inclosure #3.

EXHIBIT K

Mrs. Molly H. Minudri
210 Post Street, Suite 1114
San Francisco, California 94108

Dear Mrs. Minudri:

This acknowledges your letter of November 14, 1963, concerning the appeal of Miss Grace C. Mancilla.

* * *

If, at the time of review you wish to make request for a presentation by the agency of specifically identified documents in possession of the agency, and which are pertinent to the charges upon which Miss Mancilla was removed, our representative will transmit that request to the agency. He will also transmit any request made for the presentation of particular witnesses under the authority of the agency in connection with a hearing before the Commission. Again we point out that the Commission does not have subpoena power and cannot compel the attendance of any witnesses at the hearing which it holds upon the appeal.

* * *

FOR THE DIRECTOR

Sincerely yours,

John F. Jackson
Appeals Examiner

EXHIBIT L

San Francisco, Californi
December 2, 1963

Director

12th U.S. Civil Service Region

I have been advised of the evidence obtained in the investi gation of my appeal under Section 14 of the Veterans' Preference Act of 1944, as presented to me by a Civil Service Commission representative. I have no evidence to present in addition to that already provided.

I have been fully informed of my right to a hearing on my appeal and understand that the hearing, if requested, will be held at San Francisco, California.

My decision concerning the hearing is made of my own free will and is as follows (see note below):

I desire a formal hearing.

GRACE G. MANCILLA
(Signature)

Witness:

Robert Stricklin
Investigator
U.S. Civil Service Commission

December 5, 1963

EXHIBIT M

Mrs. Molly H. Minudri
210 Post Street, Suite 1114
San Francisco, California 94108

Dear Mrs. Minudri:

This refers to the appeal of Miss Grace C. Mancilla, whose hearing has been scheduled for the date, time and place indicated below.

The request you made to Mr. Stricklin, the Commission's Investigator, that the agency present certain specified information and documents has been transmitted tothe Defense Alameda Facility. We have asked the Personnel Officer to furnish to you prior to the date of the hearing copies of the pertinent position descriptions; copies of requests for transfer submitted by Miss Mancilla, or in lieu thereof, a listing of the requests, and dates thereof, for transfer by Miss Mancilla; and copies of performance ratings for the past three years.

You are reminded that the Commission cannot require the attendance of any witnesses at its hearing, and it cannot reimburse witnesses or other parties to the appeal for expenses incurred in connection with the hearing. It is suggested, therefore, that since the responsibility for presenting witnesses at the hearing rests upon the parties to the appeal, any request that you may have for the agency to present particular witnesses should be submitted to the Personnel Officer at the Defense Alameda Facility.

FOR THE DIRECTOR

Sincerely yours,

John F. Jackson
Appeals Examiner

EXHIBIT O

UNITED STATES CIVIL SERVICE COMMISSION
SAN FRANCISCO REGION
OFFICE OF THE DIRECTOR, SAN FRANCISCO, CALIFORNIA

APPEAL OF GRACE G. MANCILLA UNDER THE PROVISIONS OF SUBPART B, PART 22 OF THE COMMISSION'S REGULATIONS

January 3, 1964

Position:	Stock Control Clerk
Agency:	Defense Subsistence Suppl Agency, Alameda, Californa
Action Appealed:	Removal
Findings:	Agency Sustained
Appellant's Date of Birth:	October 27, 1914

FINDINGS AND RECOMMENDATION OF THE U.S. CIVIL SERVICE COMMISSION

* * *

APPEAL UNDER THE PROVISIONS OF SUBPART B, PART 22 OF THE COMMISSION'S REGULATIONS

* * *

PART IV. DEVELOPMENT OF THE EVIDENCE

Investigation upon this appeal was conducted through correspondec with the appellant and agency, as initiated on October 7, 1963. U reviewing the assembled file on December 2, 1963, Miss Mancilla requested a hearing before a representative of the Commission. Such a hearing as held at San Francisco, California on December 16 1963. Participating in the hearing were the appellant, her representative, and the representatives of the agency. A summar of the proceeding was prepared and the participants in the hearing indicated concurrence with the hearing summary through their signatures. A copy of the summary of hearing is attached to thi analysis and decision.

PART V. THE CHARGES AND ANAYLSIS OF THE EVIDENCE.

Appellant's removal was based upon two charges, Insubordination and Inefficiency. * * *

Appellant denied the accusations in Specifications a. and b., and also denied the accusation in Specification c. alleging that there had been previous instances when she had been insubordinate to her supervisor. Appellant contended that there was no justifiable basis for any complaint by her fellow workers that she had been disruptive or that she had adversely affected the work production and morale of her associates. It was appellant's contention that she was amenable to supervision and that she did not act in a rude and loud manner when addressing her supervisor in connection with the incidents of 12 July 1963. Appellant also denied slamming papers on her supervisor's desk and of striking her supervisor. The representations by Miss Mancilla were that the conduct charged against her should more properly have been charged against the supervisor.

In support of the charges, the appeal file contains statements by six of appellant's fellow employees and also the testimony of the supervisor, Mrs. Ruth Jones. Our review shows that each of the contentions presented in the specifications is supported by statements of several witnesses. Based upon a preponderance of evidence, we find that specifications a., b., and c., under Charge 1 are sustained. In finding that the

agency has proved specific instances wherein appellant refused to obey orders, berated her supervisor when the latter attempted to counsel her, struck her supervisor and slammed work upon the desk of her supervisor, and acted in a manner resulting in complaints from fellow employees, it follows that the charge of Insubordination must be sustained.

Under Charge 2, Inefficiency, there were set forth in the advance notice of proposed removal seven specifications of duty deficiencies. The items are numbered specifications a through g, and the period of time included is from 21 February 1963 through 10 June 1963. While in some instances the specifications were set forth in considerable length and involved multiple alleged deficiences in Miss Mancilla's work or attitude, the principal deficiencies are summarized as follows: Specification a related to errors in assembling Voucher Receiving Reports submitted to the Requirements and Control Branch, which were returned for correction of errors (four examples supplied); Specification b concerned errors in postings made by appellant to a register that she maintained, misfiling of folders, and posting receiving report voucher numbers to the wrong purchase order entries; Specification c concerned inability of appellant to locate the proper number of priced copies of certain receiving reports (four examples supplied) and refusal to comply with the supervisor's instructions to properly assemble receiving reports; Specification d concerned errors in filing and posting particularly with reference to purchase orders; Specification e related to an incident wherein

appellant was alleged to have refused to follow the instructions of her supervisor in accomplishing her filing work at the filing desk located in front of appellant's control desk, and of also declining to accept the supervisor's instructions as to where the registers would be maintained; Specification f concerned appellant's alleged errors in failing to recognize and forward priced copies of the Receiving Reports for Capital Funds, resulting in the request from other Regional Headquarters that the copies be furnished (ten examples supplied); and Specification g alleged that appellant failed to make required entries in her register for two warehouse tallies which were received, and of filing the warehouse tallies in the respective purchase order folders under the scheduled delivery date, with the result that they were not located except by chance more than two weeks later (the two warehouse tallies being furnished as exhibits).

Repeated throughout the presentation of the specifications above are contentions that appellant refused to accept constructive criticism, refused to acknowledge errors even when in her own handwriting, insisted that she would work on her own terms and would not listen to the advice and counsel by her supervisor, and that she was uncooperative as evidenced by her attitude and her work performance.

Many of the specifications are supported by exhibits of the actual work, as we have noted above. Others are supported by written records prepared by the supervisor, Mrs. Ruth Jones, at the time of the incident. All accusations are backed by sworn testimony of Mrs. Ruth Jones.

It has been brought out by appellant's representative that some of the procedures involved are not delineated in appellant's job description. However, appellant cannot be excused of errors on the basis that her job description does not cover in minute detail all aspects of appellant's duties, and the specific procedures applicable to carrying out those duties. At various time appellant has contendedthat she was not given proper instructions on how to carry out her job assignment, and at other times it has been contended by appellant, and in her behalf, that Miss Mancilla was given no opportunity or org anize her own work but was required to perform in compliance with someone else's ideas on how the job should be run. Miss Mancilla submitted for the record a large number of what she described as "unpleasant notes" received from her supervisor. This was for the purpose of showin that appellant's supervisor, Mrs. Jones, felt personal animosity toward Miss Mancilla. After receiving these notes, we cannot agre with the conclusion drawn by Miss Mancilla; however, the notes do reflect that Mrs. Jones found many errors and shortcomings in appellant's work, including the same, or similar, errors which are involved in the present specifications. It was appellant's contention that her working relations with her supervisor were so unpleasant that she sought every means of getting a transfer from the section, and in this connection she furnished a number of documents reflecting such attempts. Our review shows that in each and every case where transfer was sought it was for the purpose apparently of securing a promotion. It is also noted that in the letter to the Personnel Officer appellant specificall indicated that she was not interested in a transfer.

With respect to the substantive matters involved in Specifications a through g under Charge 2, appellant has denied all accusations, with the exception of one or two items, which she indicated she could not remember. Appellant contended that errors attributed to her were made by others, or that any error for which she was responsible was due to inadequate and poor instructions from her supervisor.

After careful review of the entire record, we can find no reasonable basis for believing that the deficiencies with which appellant has been charged were not in fact her own. Neither do we find that the extenuating circumstances claimed by Miss Mancilla were such as to justify her unsatisfactory performance of duty. On the contrary, the record indicates that appellant resisted efforts by her supervisor to assist her in performing the duties of her job in a proper and satisfactory manner. Specifications a through g under charge No. 2 are sustained, and upon those instances of unsatisfactory accomplishment of the duties encompassed in her position of Stock Control Clerk, we find that the charge of Inefficiency is sustained.

PART VI. FINDINGS AND RECOMMENDATIONS

In review, we find that all procedural requirements were met by the agency in effecting the removal of Miss Mancilla.

On substantive grounds, we find that the action was taken for such cause as will promote the efficiency of the service. For these reasons, we find that the removal of Miss Mancilla should be sustained.

* * *

Since there is no right to a further hearing, all representations should be submitted in duplicate with the appeal to the Board

of Appeals and Review.

Asa T. Briley
Director

EXHIBIT O-1

SUMMARY REPORT OF HEARING
PART 22B APPEAL OF
GRACE G. MANCILLA

Date of Hearing: December 16, 1963

Place of Hearing: San Francisco, California

Persons Present at Hearing:

(a) For the Commission:

Mr. Warren G. Tann, Hearing Officer

(b) For the Appellant:

Miss Grace G. Mancilla, Appellant

Mrs. Molly Minudri, Appellant's Representative

Mrs. Blanche Arnold, Witness

(c) For the Agency:

Mr. R. J. Lindsay, Agency Representative

Commander Kenneth M. Ross, Agency Representative

Mr. Lee R. Thibodeau, Witness

Mrs. Ruth Jones, Witness

Mr. Tann made a preliminary statement concerning the procedures to be followed; advised that a summarization of the hearing would be prepared; administered the oath; and invited appellant's representative to proceed.

In her opening remarks Mrs. Minudri stated that the action stemmed from charges by the immediate supervisor culminating from an indident of 12 July 1963.

Objection is made to inclusion in the record of the unsworn statements in the file on the basis it is not known whether or not they were written for the witnesses by someone else, or what pressures may have been brought to bear; it is also objected that a piece of paper cannot be cross-examined.

Objection is also made to any reference to Mrs. Mancilla's being sent to IBM school since it is believed that the conclusions reached that she failed to accomplish in connection therewith are incompetent, irrelevant and immaterial. Mrs. Mancilla was employed as Stock Control Clerk, GS-3 with the promise that she would have opportunity to go into the position of General Clerk (Steno) which was the position she was examined for; that without any past experience or ability along those lines she was placed in the position of Stock Control Clerk, a very demanding and technical job, and one with a very heavy work load.

In continuation, Mrs. Minudri stated that we have requested information from the agency concerning the overall work of Mrs. Mancilla's particular division and how the work was assigned to her, a job in which others did work, such as filing, and for whose errors Mrs. Mancilla was held accountable, but that this information has not been supplied by the agency. Mrs. Mancilla had no opportunity to organize her work but had to perform in compliance with someone else's ideas of how the job should be run. Appellant tried to get transfers out of this section.

Per Mrs. Minudri, appellant denies that she committed the errors attributed to her or that she struck her supervisor as charged.

At no time did she attempt or want to be insubordinate. In her behalf it will be shown thru testimony of a former fellow worker that she had a good disposition and is easy to work with.

Mrs. Minudri stated that there was constant turmoil in this particular Center and in relation to this particular work the difficulty that developed between the two women is not entirely Mrs. Mancilla's fault. While courtesy to a supervisor is required, an employee should not be expected to submit to unreasonable and arbitrary demands. The supervisor in this case perhaps also was harrassed and had more work than she could do. These things give rise to conditions not conducive to good relations between parties who work together.

Mrs. Minudri objected to inclusion of anything in the record predating the time that Mrs. Jones took over as supervisor (established to be February 21, 1963). Included in this incompetent, irrelevant and immaterial information is a reprimand among other things.

Re specification a under charge 1, Mrs. Minudri questioned Mrs. Jones on alleged "properly given instructions" and Mrs. Jones explained that the instructions were hers (Mrs. Jones) given to Mrs. Mancilla in writing on the outside of the folders requesting her to make the erasures in the registers relating to duplicate entries. As to who made the duplicate files, Mrs. Mancilla did. It is not proper procedure to make duplicate files; the incidental papers for which these duplicates were made should be incorporated in the basic file.

There were approximately 30 of these duplicate files spread over a period of several weeks, pertaining to vouchers in June and July. Mrs. Jones related that the initial documents upon which a file is prepared is the purchase order; the file is set up according to the last two digits is the purchase order placed in the upper right hand corner for control purposes. Once completed the filing is based upon the voucher number; subsequent papers that come in are given the debit voucher number and appended to the file.

To question by Mrs. Minudri, Mrs. Jones stated that the control desk (Mrs. Mancilla's) initiates the papers on cases; that once a case is logged in the folder is placed in the suspense file in a special cabinet; that only on very rare occasions are these folders ever removed from this file; that "miscellaneous" papers are received covering the finished cases, which when closed are sent out to various places. Mrs. Jones stated that the miscellaneous papers have the purchase order number on them; that she (Mrs. Jones) circles the purchase order number and puts the papers in the "in" basket on the control desk (Mrs. Mancilla's) where appellant is supposed to consult the proper register to link the papers with the file; that there are 4 registers in all; that if she found that the file was completed she identified it with the proper voucher number in order to ultimately attach these miscellaneous papers to the file; that she should not have prepared duplicate files in such instances as this clogs the books. When it is determined that this is a duplicate it has to be removed and the information incorporated in the proper

folder. Asked if it is customary to make pencilled entries, Mrs Jones said--yes--but only in such cases where the initial purcha request is a telegram or some other communication, and not the ac purchase order itself; that when there is a purchase order, it i wrong to make a pencilled entry.

To further questions by Mrs. Minudri, Mrs. Jones stated that othe clerks (processing clerks) in addition to Mrs. Mancilla did look through this material in the control desk incoming basket, and this for the purpose of looking for telegrams and other informati pertinent to processing; that it is immaterial to Mrs. Mancilla job on the control desk whether the voucher folders were or were not in the files in Mrs. Mancilla's office; that if the files were not on hand but were in the shipping department or somewher else, the "incidental" or "miscellaneous" papers should be place in a file basket awaiting return of the pertinent folders; that she had discussed this procedure with Mrs. Mancilla several time

Asked whether there is a specific written statement of procedure in this matter, Mrs. Jones stated that Mrs. Mancilla was given oral instructions many times on this procedure, but that she (Mrs. Jones) knows of no written description of the procedure. Asked how she knows that Mrs. Mancilla knew the procedure for holding miscellaneous papers and later attaching these papers as the vouchers appeared, Mrs. Jones said Mrs. Mancilla had beer doing this job for a long time and that had been instructed on the procedures by both her and Mrs. Mancilla's previous supervisor. To further question Mrs. Jones stated that the

entries made in the registers were normally made by Mrs. Mancilla, but were occasionally made by her (Mrs. Jones), and also by Mrs. Morris, when Mrs. Mancilla was taken off the control desk.

Asked if she had not counseled Mrs. Mancilla about the backlog of filing, Mrs. Jones said--yes she had.

To question by Mrs. Minudri, Mrs. Jones explained that there are two types of files--one a formal file established when the purchase order has been received and a "suspense" file when the actual Purchase Order has not been received; that in the latter case the entries are made in pencil and later written over in ink when the Purchase Order is received.

Mrs. Minudri then questioned Mrs. Jones as to the meaning of certain functions set forth in Mrs. Mancilla's job description.

Under further questioning by Mrs. Minudri, Mrs. Jones explained that after a receiving report has been typed, an original and a signed copy are transmitted to the Finance & Accounting section; the third copy is the Receiving Branch's permanent record; the Receiving Branch's voucher copy goes to the Shipping Branch together with lot cards; it is kept there until the shipping people are through with it then is sent over to Requirements & Control for funding; it then flows from there back to the file desk in front of the Control desk; here it is checked off against the voucher numbers in the registers and is filed.

Asked why the miscellaneous papers are placed on Miss Mancilla's desk when Miss Mancilla had completed her part of the operation,

Mrs. Jones stated that it is Miss Mancilla's job to check the registers to determine the status of the particular purchase order and to dispose of the papers. Mrs. Minudri presented copy of job outline pertaining to Miss Mancilla's position, noting that this procedure is not described in the position description. (It was stipulated that this job description was issued to Miss Mancilla on May 14, 1963). Mrs. Minudri stated it appeared that the method used by Miss Mancilla in handling miscellaneous papers was a reasonable and logical one, in lieu of having to check frequently and regularly to determine if the folders had come back. Mrs. Minudri stated there is nothing to show that there were ever "properly given instructions" regarding the matters contained in specification a of charge 1.

To questions by her representative, Mrs. Mancilla stated that re July 12 she received a note from Mrs. Jones to take out pencilled entries on the vouchers; that all the entries were not in her handwriting; that a few of them were that she approached Mrs. Jones and advised her that all the errors were not hers and asked if there were some other way to make the adjustments desired; that the pencilled entries she made re the miscellaneous papers were in accordance with practice as she understood it; that she had not been advised otherwise concerning procedure for handling papers which "straggle" in after the voucher had been made up; that with respect to each and every pencilled entry at issue re incident July 12, she had not checked to see if the vouchers had been completed;

that when she questioned Mrs. Jones, Mrs. Jones snatched the papers out of her hand and took them to Mr. Thibodeau. Appellant responded to question by her representative that she did not insubordinate in the manner described in the charge; that Mrs. Jones was frequently very critical and wrote unpleasant "notes" in pointing out alleged errors; that she had tried to talk to Mrs. Jones about more efficient ways to do the work, but the latter would not listen,and insisted she would not descend to appellant's level in this regard.

Mrs. Minudri submitted in evidence a number of "notes" by Mrs. Jones to Miss Mancilla. (accepted as hearing exhibit #2).

To question by Mrs. Minudri, Miss Mancilla stated that other clerks on control desks also used the same type of suspense file that she made; and also made penciled and ink entries on the registers as she was accused of doing. Mrs. Jones denied this was done. Appellant stated it is very easy to make duplicate entries when one is in a hurry and has a lot of work to perform. Appellant stated she checked the folder referred to in specification a of charge 1 and determined that most of the pencilled entries were made by others.

Asked by Cdr. Ross how long she had been assigned to the Receiving Section, appellant answered approximately 3 years. To further questions, appellant stated that she received very little instructions on how to do the job; that she had to work out the job on her own; that she had to find answers from other employees in the section; that she never took the matter to Mr. Thibodeau but

that she had on many occasions gone to Mr. Lindsay, the personnel officer, to complain of inadequacy of instruction; that she recale talking to Cdr. Ross only on one occasion in this regard; that maybe she talked to him one other time also when Mrs. Williams was her supervisor; that she complained to Cdr. Ross of the relations with her supervisor.

Mrs. Jones responded to contentions by appellant and her represena re specification a, Charge 1, in stating that the errors alluded to were, in fact, in Miss Mancilla's handwriting.

Re specification b, Charge 1, Mrs. Jones, when questioned as to where appellant struck her, stated it was on the back of her hand; that it resulted in a discoloration and stung for sometime.

Miss Mancilla stated that she did not strike Mrs. Jones but may h accidentally touched her finger when reaching across the desk to up some folders; that Mrs. Jones got angry when appellant placed some folders on her desk and accused her of slamming the folders on her desk. Appellant denied that she slammed the Shipping Tic Registers on Mrs. Jones' desk or that she recalls telling Mrs. Jones "oh, be still". Miss Mancilla stated she left Mrs. Jones' desk stating that she was going to Civilian Personnel to tell what happended, after Mrs. Jones accused her of hitting her, and that she did go to the personnel office. Appellant states she had never been violent toward Mrs. Jones.

Cdr. Ross asked Miss Mancilla if there wasn't a conversation about her excitable nature in prior instances concerning both Mrs. Williams and Mrs. Jones, to which Miss Mancilla responded--No--she does not recall any such discussion. Cdr. Ross questioned Mr. Lindsay who stated that it was pretty clearly established in a conversation in the Civilian Personnel Office that this type of conflict between the employee and the supervisor existed and the decision was reached that this could not be tolerated; that in his office (Mr. Lindsay's) Cdr. Ross specifically counseled Mrs. Mancilla that she would have to control her temper.

To question by Mrs. Minudri, Cdr. Ross stated he had never personally seen Miss Mancilla lose her temper; that she was never in the environs at such times; that she had talked to Miss Mancilla and to Mrs. Jones individually; that his knowledge of the type of conduct charged to appellant is based on information from Mr. Thibodeau and Mrs. Jones.

Mrs. Minudri moved that specification c, of charge 1, be stricken on the grounds that the persons alluded to are not here to testify, and also the charge is complete hearsay.

Re specification a of charge 2, Mrs. Minudri referred to exhibit B and questioned Mrs. Jones as to the proper procedure. Re Exhibit C Mrs. Jones said this item, as well as Exhibit B, was improperly assembled. To question by Mrs. Minudri if this doesn't refer to errors before receipt by appellant on 5/14 of her job description which outlines the procedure, Mrs. Jones said--yes, but that Miss Mancilla had been doing this work since December 26, 1962

Appellant stated she doesn't recall these particular exhibits a doesn't know that it is her own work, but it could have resulte from the documents being delivered to her late in the afternoon, when on such occasions she was unable to complete them that day, and sometimes left them for Mrs. Jones to do. Mrs. Jones stated that appellant did approximately 50 of this type of documents per day; that this would be done in late afternoon; that if ther were a great many to do, she (Mrs. Jones) helped by doing "Outsi Market Centers" so that appellant wouldn't have to stay late. Mrs. Jones, to question, stated that these particular items were done by Miss Mancilla.

Re specification b, Charge 2, Mrs. Minudri stated there is no supporting evidence for this charge, and moves that the charge be eliminated as geneeral in character.

Re specification c, Charge 2, Mrs. Jones explained that the exhibits include DSSC Form 300 (which is the Purchase Order), Form 300-2 (which is the Receiving Report, and which is on the back of the Purchase Order) and Form 300-1 (which is a continuation of the Form 300 (the Purchase Order). Asked if she had ever previously advised appellant that the proper number of priced copies in multiple pricing would be found on the last page, Mrs. Jones said--yes--she had told Miss Mancilla of this previously. To further question by Mrs. Minudri, Mrs. Jones stated that when she gave appellant instruct she did not use a dictatorial tone. Appellant responded that Mr Jones did not talk to her in a nice way on this occasion; that

she said "Helen Gamble (identified as the processing clerk) does not make errors, so get with it." Appellant responded that she had seen work improperly put together by the processing clerk.

Questioned by Cdr. Ross if on this day she did not talk to the Chief, Requirements and Control, Mrs. Mancilla said no, not on that particular day. Cdr. Ross stated he saw Miss Mancilla talking to Mr. Chew, Chief of the Requirement and Control, concerning this incident; and that while he did not overhear the conversation he did talk with Mr. Chew later about what had transpired. Appellant denied she discussed this matter with Mr. Chew, and to question as to what her conversation with Mr. Chew was concerned with, stated she did not recall what she may have discussed with Mr. Chew on the day in question.

Re specification d of Charge 2, Mrs. Jones responded to Mrs. Minudri that "Pier 4" items involve direct delivery to the piers; that these items require special handling. Asked how may Pier 4 ASD's she handled, Miss Mancilla stated she did not handle very many. To appellant's statement that the purchase orders were supposed to go in the file, Mrs. Jones replied that they were not supposed to go in the files, and that she had pointed this out to appellant, and specifically recalls doing so on one occasion when she (Mrs. Jones) caught 4 or 5 of these in a row that had been filed by appellant. Appellant stated she does not recall this incident.

Re specification 3, Charge 2, Mrs. Jones stated that the inciden was on one of those occasions when because of a large amount of filing, she relieved Miss Mancilla of control desk duties so that she could do the filing, but that the problem arose as described in the charge in this particular instance; that on prior occasio Miss Mancilla had not made an issue of this procedure. Appellan denied that her supervisor instructed her to do the filing at t filing desk but stated she just told her to do the filing. Appel denied that her supervisor told her that she would relieve her a the control desk. Appellant stated that she was not given prope instructions as to where she was to sit. Mrs. Jones stated that she did, in fact, instruct her where to sit, to which Mrs. Mancil responded that she had no knowledge of where her supervisor want her to sit. Mrs. Jones stated that she told Miss Mancilla sever times that she should sit at the filing desk as she (Miss Mancil always had done in the past in such instances and that Mrs. Manc refused to comply.

Miss Mancilla stated she had previously received a memorandum from Mr. Thibodeau concerning her place to sit. Agency submitte copy of this, the memorandum in question, which was accepted as Hearing Exhibit #3. Mr. Thibodeau said this memorandum was concerned with another matter, not the matter at issue in the prese charge.

Re specification f, Charge 2, Miss Mancilla examined the exhibit presented in support of the charge, and stated she cannot determine upon this examination whether these items are "Capital Fund" copies. Asked how she could determine these were Miss

Mancilla's errors, Mrs. Jones said she attributes these to Miss Mancilla because on those days appellant was on the control desk and would have done this work. Mrs. Jones stated the backlog on filing is done between the 7th and 10th of the month; that then she (Mrs. Jones) sometimes takes over the control desk to relieve Miss Mancilla for filing, that on this particular occasion she (Mrs. Jones) brought to Miss Mancilla's attention that these were capital fund copies, which Miss Mancilla denied, but which later were determined to be Capital Fund copies. Miss Mancilla stated she had been doing this stripping for a long time, and while she cannot remember this specific instance, can see no reason why she would suddenly do it wrong, a type of work which is routine and not complicated.

Re specification g, Charge 2, appellant, to questions, stated that according to her information Mrs. Williams placed the warehouse tallies in the Purchase Order folders. Mrs. Jones, to question, agreed that she was not appellant's supervisor at this particular time. Mrs. Jones stated she was, however, the person who later found the items. Mrs. Minudri moved that this charge be stricken as hearsay. Cdr. Ross referring to paragraph 5 of charge letter, which Mrs. Minudri had characterized as irrelevant stated this matter is germane since cuts were forthcoming in the receiving branch and retraining in other work for this personnel was necessary.

Mrs. Minudri submitted correspondence and data re attempts by Miss Mancilla to secure transfers since she was not happy in her work situation.

Accepted as hearing exhibit #4. Mrs. Minudri stated that Miss Mancilla, upon going to work for this agency, was promised that within 3 months she would be given an opportunity to be considered for a job of Clerk (Stenography); that this did not materalize. Appellant stated she hired in with the agency as a clerk-typist because there were no openings for Clerk (Stenography). Appellant stated she had not in her other jobs in Federal Service (15 years in all) had any problems.

Mr. Lindsay, to question by Cdr. Ross as to whether there were a general demand for Clerk (Steno), said--no--not in his organization.

To question by Cdr. Ross, Miss Mancilla stated she applied for the steno type jobs indicated in hearing exhibit #4 but had not been selected; that no one had objected to her applying for the jobs though. Appellant stated that she was actually hired as clerk-typist by this agency.

Mr. Ross stated the job of clerk-typist that Miss Mancilla had worked at required only 10% typing with the remainder of the job being general clerical duties.

Mrs. Arnold, questioned by Mrs. Minudri, stated she worked with Miss Mancilla for approximately 2 years with Records Accomplishment, Oakland Army Base, during the period from approximately

1959 to 1961, and that she worked in close proximity to Miss Mancilla; that she had lunch with appellant every day; that she never saw any arguments or altercations between Miss Mancilla and co-workers or supervisors; that Miss Mancilla was well liked and accepted; that she had kept up her friendship with Miss Mancilla; that she has never noted her to be emotionally disturbed or to have a violent or quick temper and never saw her go into any tirades in connection with her work or work associates.

To question by Cdr. Ross, Mrs. Arnold stated that she did not know the reasons for Miss Mancilla's leaving the job with Oakland Army Base, and does not know specifically all the work that Miss Mancilla did there, but that it involved a great deal of typing; that she does not know what Miss Mancilla's efficiency ratings were.

All information and evidence having been submitted by the parties, the hearing officer closed the hearing.

Warren G. Tann
Hearing Officer

EXHIBIT O-2

STATEMENT OF AGREEMENT WITH HEARING SUMMARY

I have heard read to me the summary of hearing and have been

offered opportunity to make additions, deletions and changes. I agree the summary fairly reflects the matters brought out in the hearing.

/s/ Grace G. Mancilla
Appellant

/s/ Molly H. Minudri
Appellant's Representative

/s/ Kenneth M. Ross LCDR USN
Agency Representative

/s/ R. J. Lindsay
Agency Representative

EXHIBIT R

July 15, 1964

Mrs. Molly H. Minudri
Attorney at Law
210 Post Street, Suite 1114
San Francisco, California 54108

Dear Mrs. Minudri:

Reference is made to your appeal in behalf of Miss Grace G. Mancilla from the decision of the Commission's San Francisco Office which sustained, under part 22 B (now 752B) of the Commission's regulations, her removal from the position of Stock Control Clerk, GS-3, $4500 per annum, effective September 30, 1963, by the Commanding Officer, Defense Subsistence Supply Agency, Alameda, California on charges of Insubordination and inefficiency.

The Board of Appeals and Review has fully considered the entire appellate record in Miss Mancilla's case, including all information developed during the processing of the appeal in the Regional Office, the testimony given at the hearing held

on December 16, 1963, and all representations submitted subsequent to the Regional decision.

In its decision, the Regional Office held that all the procedural requirements had been met by the agency in effecting Miss Mancilla's removal. On the merits, the Regional Office found that all specifications shown under Charge 1, insubordination, and all specifications shown under Charge 2, inefficiency, were supported by a preponderance of the credible evidence. Having found these charges sustained, the Regional Office concluded that the removal was warranted and that it had been taken for such cause as would promote the efficiency of the service.

* * *

The basic issues in this appeal are whether Miss Mancilla failed to carry out the instructions of the supervisor and whether her performance was of such caliber as to be calssified as inefficient.

You also content that the admission and consideration of unsworn affidavits of fellow employees is a reversible error. It is argued that the employees should have been given an opportunity to cross-examine them at the Commission hearing.

A review of the appellate record shows that you were properly advised that the Commission has no power of subpoena and could not force the attendance of witnesses. However, in response to your statement in your letter of November 14, 1963, that you would furnish the Commission with a list of witnesses, you were advised by letter of November 20, 1963, that the Commission

representative would transmit to the agency such request for the presentation of any particular witnesses providing those persons were still under the authority and control of the agency. From the record, it is apparent that you failed to respond to the invitation to obtain the assistance of a Commission representative in the production of witnesses.

In your appellate brief, you also state that you made a timely request to the agency for the production of these witnesses and that you were informed the day before the hearing that the agency would not order the employees to serve as witnesses but that Miss Mancilla could ask such employees to come in on a voluntary basis and time off would be granted to such employees. You argue that this information came too late, that the request could not be made until the morning of the hearing and that all employees declined to appear.

While it is somewhat repetitious, it must again be emphasized that under the agency's and the Commission's regulations it is the responsibility of the parties to the appeal to produce their own witnesses. In this connection, the agency fulfilled its responsibility by stating that it would grant the time off for any employee who would voluntarily appear. Failure on the part of Miss Mancilla to produce witnesses cannot be considered as an overriding factor sufficient to vitiate the agency action.

Finally, you argue against the weight and credibility of the evidence submitted by the agency in support of the charges, particularly the unsworn statements of her co-workers. The

Board recognizes that it is, of course, desirable to have such evidence under oath. Nevertheless, unsworn statements are acceptable and given such weight as they deserve particularly in a case such as this where the statements are used to supplement or corroborate other evidence.

In view of the foregoing and after considering all the facts and circumstances of the case, the Board finds, as did the Regional Office, that the agency complied with all the procedural requirements of the law and regulations in effecting Miss Mancilla's removal. As to the merits, the Board concurs in the Regional Office analysis of the evidence and the findings that all the specifications under Charge 1, insubordination, and all the specifications under Charge 2, inefficiency, are substantiated by a preponderance of the credible evidence and are sustained.

On the strength of the sustained charges, the Board has concluded that Miss Mancilla's removal was warranted; that it was effected for such cause as will promote the efficiency of the service within the meaning of that language in the law and regulations, and that the decision to effect removal rather than take some lesser disciplinary action was not unreasonable, arbitrary or capricious. Accordingly, the decision of the Regional Office of which you were notified on January 3, 1964, is hereby affirmed.

For the Commissioners:

Sincerely yours,

E. T. Croark
Chairman, Board of Appeals
and Review

NO. 21,174

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICOLE EUGENIE MARIE FARGUES,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

RESPONDENT'S BRIEF

CECIL F. POOLE
United States Attorney

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
Telephone: 556-7633

Attorneys for Respondent

INDEX

AUTHORITIES CITED

AUTHORITIES CITED, continued

NO. 21,174

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICOLE EUGENIE MARIE FARGUES, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	]

RESPONDENT'S BRIEF

JURISDICTION

Petitioner has filed her petition pursuant to the authority of 8 USC 1105(a), Section 106(a) of the Immigration and Nationality Act, for review of the final order of deportation of February 18, 1966 (R., P. 32). The appeal to the Board of Immigration Appeals was dismissed on July 7, 1966. The petition was filed on August 17, 1966, within six months of the dismissal of the appeal.

Foti v. INS
375 US 217

STATEMENT OF THE CASE

Petitioner is a native and citizen of France, age 33 as of May, 1966. She married Louis Fargues in France. She entered Canada at Montreal with her husband on September 27, 1958 (R., Exhibit 2). She left her husband and son in July, 1964, and entered the United States on or about July 20, 1964, and came to California. She met Gordon Leon Kay in September, 1964. She was returned to Canada at government expense on January 14, 1965. She last entered the United States at Sumas, Washington, on or about June 20, 1965, without documents and without inspection. She claims to have entered with Gordon Kay by automobile about 11 p. m. (R., pp 44-45). A child was born at Lynnwood, Washington, on August 2, 1965, and was named Daniel Lee Kay. Gordon Kay is the father.

An action for divorce against the husband, Louis Fargues, was filed in the Superior Court at Fresno, California, and on March 2, 1966 an interlocutory decree was obtained (R., p. 27). A final decree was obtained on or about January 4, 1967, and petitioner and Gordon Leon Kay were married on January 24, 1967, in Fresno County.

Deportation proceedings were instituted against petitioner by the issuance of an Order to Show Cause, on February 10, 1966 (R., Exhibit #1, p. 55). A hearing in deportation proceedings was held at Fresno, California, on February 18, 1966. By decision dated February 18, 1966, the Special Inquiry Officer found petitioner deportable on the charge in the Order to Show Cause, to-wit, entry without inspection, Section 241(a)(2) of the Immigration and Nationality Act, on or about June 20, 1965.

Petitioner appealed to the Board of Immigration Appeals. By order dated July 7, 1966

the appeal was dismissed. A copy of the Order of the Board of Immigration Appeals is attached hereto as Appendix I.

STATUTES

§ 241(a)(2) 8 USC 1251(a)(2)

"(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;"

§ 245 8 USC 1255

"(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, * * * "

§ 291 8 USC 1361

" * * * In any deportation proceeding under chapter 5 against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States, * * * "

8 CFR 242.14(a) (January 11, 1967)

> "§ 242.14 Evidence.
> (a) Sufficiency. No deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true."

ERRORS CHARGED

1. Investigation officer of respondent erred in taking a statement from petitioner.

2. Hearing officer erred in allowing affidavit in evidence.

3. Hearing officer erred by taking the statement of petitioner without informing her of the privilege against self-incrimination.

4. Hearing officer erred in proceeding with the hearing when petitioner was not represented by counsel.

5. Board of Immigration Appeals erred in upholding finding of the Special Inquiry Officer.

QUESTIONS PRESENTED

1. Was petitioner accorded due process and a fair hearing?

2. Has respondent established deportability by clear, unequivocal and convincing evidence?

ARGUMENT

Petitioner was accorded due process and a fair hearing.

1. Deportation proceedings are civil in nature and not criminal.

Fong Yue Ting v. US
149 US 698

U. S. ex rel Bilokumsky v. Tod
263 US 149

Harisiades v. Shaughnessy
342 US 580

Galvan v. Press
347 US 522

Marcello v. Bonds
349 US 302

Mulcahy v. Catalanotte
353 US 692

Fuentes-Torres v. INS
344 F.2d 911;
cert. den. Oct. 11, 1965,
382 US 846

Ben Huie v. INS (9 Cir.)
349 F.2d 1014

MacLeod v. INS (9 Cir.)
327 F.2d 453

Nason v. INS (2 Cir.)
No. 30623, January 10, 1967

Ah Chiu Pang v. INS (3 Cir.)
No. 15841,
decided October 28, 1966

2. Section 291 of the Immigration and Nationality Act, 8 USC 1361, provides:

> "In any deportation proceeding under chapter 5 against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States, * * * "

The sworn statement, Exhibit 2 of the Record, was properly introduced in evidence. There is nothing in the record indicating that the statement was induced by coercion, duress, or other improper action on the part of the immigration officer.

Ben Huie v. INS, supra

Nason v. INS, supra

Ah Chiu Pang v. INS, supra

4. Petitioner's deportability has been determined by clear, unequivocal and convincing evidence. Section 242(b)(4), 8 USC 1252(b)(4) specifies:

> "(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."

The Supreme Court, in its decision in Woodby v. INS, 17 L.Ed 2nd 363, 385 US_____, held as follows:

> "We hold that no deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true."

Footnote 19 states:

> "This standard of proof applies to all deportation cases regardless of the length of time the alien has resided in this country."

As of January 6, 1967, CFR 242.14 was amended to read as follows:

3. Petitioner's reliance on Miranda v. Arizona, 384 US 436, and Escobedo v. Illinois, 378 US 478, is misplaced, not only because they have no application to deportation proceedings, because of their civil nature, but also because petitioner was not in custody or other restraint when she gave the affidavit in question. She was fully advised that her statement must be made freely and voluntarily and that it could be used against her.

Statements given freely and voluntarily without any compelling influence are still admissible, even in criminal cases.

Miranda v. Arizona, supra at p. 478.

In addition, it should be noted that the Miranda doctrine applies only to cases tried after June 13, 1966, the date of the Supreme Court's decision in that case.

Johnson v. New Jersey, 384 US 719 (732-734).

Petitioner's hearing was held February 18, 1966.

"(a) Sufficiency. No deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true."

32 Federal Register No. 6,
January 11, 1967.

CONCLUSION

It is respectfully submitted:

1. Petitioner was accorded a fair hearing and due process.

2. The deportation order was found by clear, unequivocal and convincing evidence.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

By: _____
CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Attorneys for Respondent

DATED: February 20, 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

= =

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the foregoing Respondent's Brief was served upon respondent by depositing the same in the United States mail at Main Post Office, Seventh and Mission Streets, San Francisco, California, addressed to:

Ralston L. Courtney, Esq.
Frame & Courtney
Post Office Box 895
Coalinga, California 93210
Attorneys for Petitioner.

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

February 20, 1967.

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

File: A-13774062 - San Francisco JUL 7 - 1966

In re: NICOLE EUGENIE MARIE FARGUES

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ted R. Frame, Esq.
330 North Fifth Street
Coalinga, California 93210

ON BEHALF OF I&N SERVICE: John C. Williams
Trial Attorney
(Brief filed)

CHARGES:

Order: Sec. 241(a)(2), I&N Act (8 USC 1251 (a)(2)) - Entered without inspection

Lodged: None

APPLICATION: Remain in the United States

This case comes forward on appeal from an order entered by the special inquiry officer directing that the respondent be deported from the United States to France, the country designated by her, on the charge set forth in the Order to Show Cause. The respondent, a 33-year-old female, native and citizen of France, has resided continuously in the United States since last entering at or near Sumas, Washington on or about June 20, 1965, without documents and without being examined by an officer of the Service. Deportation proceedings were instituted against the respondent on February 10, 1966. A hearing in deportation proceedings was held at Fresno, California on February 18, 1966.

APPENDIX I

The respondent at the outset of the deportation hearing was apprised of her right to be represented by counsel or some other qualified person of her choice at her own expense. When the respondent was asked if she understood the questions, she answered in the affirmative. She was next asked if she wished to be represented or to go ahead with the hearing by herself. She replied that she understood that she had to have someone but whom she did not know. She was then advised that she could have a person represent her if she desired and she replied, "Oh, no." She was then advised that she could proceed with the hearing by herself without an attorney and she replied she was not rich enough to have an attorney. When asked if she wanted to go ahead with the proceeding by herself, she replied, "Yes." (p. 2) We find absolutely no merit to counsel's declaration that she did not intelligently and understandingly waive her right to counsel. Likewise, we find no basis for counsel's assertion that the respondent had no understanding of her rights. It is noted the respondent in answering some questions replied "Uh-huh" and in response to other questions she answered "Yes." The record shows that the respondent answered many of the questions propounded to her by the expression "Uh-huh." Uh-huh is an exclamation signifying an affirmative answer (Webster's New International Dictionary, p. 2753). We have carefully screened the entire record and we find nothing therein that in any manner supports counsel's assertion that the respondent did not intelligently and understandingly waive her right to counsel. On the contrary, we find that the respondent gave clear and intelligent answers to all the questions asked of her by the special inquiry officer during the deportation hearing and that she was fully aware of the nature of the proceeding.

The respondent admitted the truth of all the factual allegations set forth in the Order to Show Cause and conceded deportability on the charge stated therein. The respondent in a question and answer statement subscribed and sworn to before an officer of the Service on August 4, 1965 deposed among other things that she

entered the United States at or near Sumas, Washington on June 20, 1965 with one Gordon L. Kays, father of her infant child Daniel, born at Edmonds, Washington on August 2, 1965. The respondent further deposed that she was the wife of one Louis Farques, a French citizen, then living in Quebec, Canada. Her testimony shows that she had been living with Gordon L. Kays in a husband and wife relationship since her last arrival in the United States; that she met the aforementioned Gordon Kays when she was visiting in the United States approximately one year ago. She stated the Welfare Department in Fresno, California paid her way back to Canada in January 1965 and that her other son, Jean Farques, 15 years of age, is living with his father in Canada. The Service officer informed the respondent at the time she made the sworn statement on August 4, 1965 that said statement must be made freely and voluntarily; that it may be used against her or any other person in immigration and naturalization proceedings. After receiving such advice the respondent freely and voluntarily made the statement which was subscribed and sworn to by her on August 4, 1965. The record reveals that the respondent remembered signing the aforementioned statement (p. 16).

It is well established that a statement obtained from an alien who is not represented by counsel may, nevertheless, be admitted into evidence and considered. Likewise, it is well established that the strict law of evidence relating to judicial proceedings do not apply to administrative proceedings (Schoeps v. Carmichael, 177 F.2d 391; cert. den. 339 U.S. 914). Since deportation proceedings are civil in nature, we are not concerned with the rules of evidence which apply in criminal proceedings (U.S. ex rel. Bilokumsky v. Todd, 263 U.S. 149). An extrajudicial statement made by a party in a civil matter that he or she has done what is in issue is admissible as evidence to prove the fact in issue and an alien's admission made on the preliminary

investigation may be used in deportation proceedings as the basis of a finding that he or she is deportable (U.S. ex rel. Bilokumsky v. Todd, supra).

Counsel's assertion that the respondent was deprived of due process of law by not being informed of her privilege against self incrimination is without merit. Since deportation proceedings are civil in nature rather than criminal the doctrine enunciated in Escobedo v. State of Illinois, 378 U.S. 478, has no application to the instant case. Among the guarantees without which there would be an absence of procedural due process are reasonable notice, the right to examine witnesses, to testify, to present witnesses, and to be represented by counsel. To render a hearing unfair, the defect, or the practice complained of, must have been such as might have led to a denial of justice, or there must have been absent one of the elements deemed essential to due process. The record before us clearly shows that all the elements deemed essential to due process are present in this case. The evidence of record clearly establishes that the respondent is subject to deportation under the provisions of Section 241(a)(2), in that, she entered the United States without inspection. The question of allowing her to remain in the United States until her interlocutory judgment of divorce from her husband in Canada filed on March 2, 1966 becomes final on January 4, 1967, so that she can marry Gordon Kay, the father of her infant son, is a matter for administrative consideration and determination by the Service. For the reasons hereinbefore set forth, the following order will be entered.

ORDER: It is ordered that the appeal be dismissed.

Thos. S. Finnegan
Chairman

See Vol. 358

No. 21,176

IN THE

United States Court of Appeals

For the Ninth Circuit

SAMUEL GOLD, HOWARD GUY HALBETT, and JOHN FRANK FUSCO,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' PETITION FOR A REHEARING

RAYMOND E. SUTTON,
Suite 105, Friedman Building,
300 Fremont Street,
Las Vegas, Nevada,
Attorney for Appellants and Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

No. 21,176

United States Court of Appeals

For the Ninth Circuit

SAMUEL GOLD, HOWARD GUY HALBETT, and JOHN FRANK FUSCO, *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	

APPELLANTS' PETITION FOR A REHEARING

To the Honorable J. Warren Madden, Judge of the United States Court of Claims, the Honorable Gilbert H. Jertberg, Circuit Judge, and the Honorable James M. Browning, Circuit Judge:

Appellants, pursuant to Rule 23 of the Rules of this Court, petition this Honorable Court for a rehearing of their appeal, which was decided by this Honorable Court on March 30, 1967, for the following reasons:

(1) That this Honorable Court did not pass upon point III of Appellants' Opening Brief, urging that the trial court erred when it denied Appellant Gold's Motion for Judgment of Acquittal as to Count I of the Indictment.

The Motion for Judgment of Acquittal was based upon the Appellee's failure to prove that the obscene film was transported in interstate commerce by a common carrier. The Indictment charged Appellant Gold with violating Title 18, Section 1462, United States Code. The Appellants' Opening Brief has set forth in its argument and legal propositions that the statute in question had not been violated by Appellant Gold merely placing the obscene film on a weighing scale at the United Air Lines freight area at McCarran Airport. The issue of whether the obscene film, based on the facts before the trial Court and this Court, constituted transportation in interstate commerce, was not answered by this Court in its Opinion filed on March 30, 1967.

(2) This Honorable Court did not pass on point V of Appellants' Opening Brief.

This Court in its Opinion did not specifically decide whether Appellant Halbett's conduct at Henderson, Nevada and Appellant Fusco's conduct at Newark, New Jersey, was sufficient as a matter of law to constitute both Appellants conspirators, as set forth in Count II of the Indictment.

The evidence showed Appellant Halbett's participation to be fleeting and a matter of a few minutes loading cartons into Appellant Gold's automobile. The evidence showed Appellant Fusco appeared at the United Air Lines freight counter in Newark, New Jersey with a woman and asked for certain packages.

This Court affirmed Appellants Halbett's and Fusco's convictions without decision on their conspiracy participation.

Wherefore, Petitioners request that a rehearing be granted.

Dated, Las Vegas, Nevada,
April 27, 1967.

Respectfully submitted,
RAYMOND E. SUTTON,
Attorney for Appellants and Petitioners.

CERTIFICATE

I do hereby certify that the foregoing Petition for Rehearing is, in my judgment, well founded, and that it is not interposed for delay.

RAYMOND E. SUTTON.